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In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the word "treaty" in 5 U.S.C. (Supp. III) 7201 note, which prohibits employment discrimination against United States citizens on military bases overseas unless permitted by "treaty," encompasses all binding international agreements concluded by the President with the host country or is limited to agreements consented to by the Senate pursuant to Article II, Section 2 of the Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and the Secretary of the Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

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* The other petitioner is Secretary of the Navy John F. Lehman, Jr. The other respondents are Cindy L. Perry, Malinda Frierson, Fred E. Bumgarner, Camela Banks, Edna Horvath, Paul Chapman, Kenneth E. Oyler, James Vinson, A. H. Schilot, George Marshall, Herb Allen, Robert Wolbert, Rex W. Thomas, Elizabeth Taylor, Susan Keyes, Carroll E. Mason, Carlos F. Garcia, Clarence Labak, Richard Anderson, Beulah M. Jones, Pilar Galvin, Beverly Walker Pratt, Harold E. Shrader, Doris M. Chaisson, Karen S. Knapp, Patricia Procter, Gertrude A. Stevens, Arthur P. Fernandez, and Cynthia A. Roybal.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 642 F.2d 553. The opinion of the district court (App. B, *infra*, 20a-39a) is reported at 467 F. Supp. 960. The administrative decision of the Navy (App. C, *infra*, 41a-45a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 46a-47a) was entered on September 15, 1980. A petition for rehearing was denied on December 18, 1980 (Apps. E & F, *infra*, 48a-49a). On March 13, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to May 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. (Supp. III) 7201 note, provides:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

STATEMENT

1. In 1944 Congress authorized the President, "[a]fter negotiation with the President of the * * * Philippines * * * [and] by such means as he finds appropriate [,] to withhold or to acquire and to retain such [military and naval] bases, necessary appurtenances to such bases, and the rights incident thereto * * * as he may deem necessary for the mutual protection of the Philippine Islands and of the United States." 22 U.S.C. 1392. Pursuant to this broad grant of authority and to its Filipino counterpart, in 1947 the United States and the Republic of the Philippines entered into a 99-year Military Bases Agreement (MBA), 61 Stat. 4019, T.I.A.S. No. 1775, which grants the United States the use of various military facilities in the Philippines and in which certain commitments were made by the United States. This agreement has been amended periodically, most recently on January 7, 1979 (30 U.S.T. 863, T.I.A.S. No. 9224).

The major American military installations currently operating in the Philippines pursuant to the MBA are Clark Air Base and the Naval Facility at Subic Bay. Wallace Air Station, John Hay Air Base and San Miguel Naval Communications Station serve as supporting facilities. Clark Air Base supports United States air operations in the Western Pacific and East Asia, and Subic Bay supports the Seventh Fleet's operations in the Western Pacific and Indian Ocean. Together these facilities comprise the logistics hub for United States operations in Southeast Asia, the Southwest Pacific and the Indian Ocean areas and perform a significant range of essential services not available elsewhere in the region.

The United States' continued use of these facilities depends in large part on respect for the Philippines' sovereignty and on stable labor relations with local employees. The MBA itself, however, contains no provisions concerning the employment of local nationals by the United States Armed Forces. To fill this void, and to assure a stable and reliable local workforce necessary to American defense interests in the Pacific, the United States and the Philippines negotiated a Base Labor Agreement (BLA), 19 U.S.T. 5892, T.I.A.S. No. 6542, on May 27, 1968, as a supplement to the MBA (see App. G, *infra*, 50a-62a). Article I of the BLA provides, *inter alia*, for the preferential employment of Filipino citizens at military facilities used by the United States in the Philippines (*id.* at 51a):

> *Preferential Employment.*—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed. Exception is permitted, however, in the case of third country nationals already employed on the date of entry into force of this Agreement and in the case of technical personnel of third country nationality as envisaged in paragraphs 1 and 2, Article XI of the Military Bases Agreement of 1947, as amended.

2. In 1971, Congress enacted Pub. L. No. 92-129, Section 106, 85 Stat. 355, now codified at 5 U.S.C.

(Supp. III) 7201 note.[1] Section 106 prohibits discrimination against American citizens and dependents of members of the United States Armed Services at Department of Defense installations and facilities in foreign countries, unless such discrimination is permitted or required by "treaty." At the time Section 106 was enacted, the United States was a party to more than a dozen binding international agreements that, like the BLA, provided some form of employment preference for local nationals but were not "treaties" within the meaning of Article II, Section 2 of the Constitution.[2] Since the passage of Section

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[1] Section 106 was previously codified at 5 U.S.C. 7151 note. The opinions and briefs below cite the prior codification.

[2] Article II, Section 2, Clause 2 provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; * * *."

In addition to the BLA, the following agreements were in effect at the time Section 106 was enacted: Mutual Defense Assistance Agreement, Nov. 21, 1956, United States-Republic of China, 7 U.S.T. 3411, 3412, T.I.A.S. No. 3713 (¶ 4); Defense Agreement Concerning Construction of Scatter Wave Radio Facility in Vicinity of Yangmingshan, Taiwan, Aug. 6, 1958, United States-Republic of China, 13 U.S.T. 2136, 2137, T.I.A.S. No. 5175 (¶ 2); Defense Agreement Concerning Construction of Communications Facility in Vicinity of Kaohsiung, Taiwan, Apr. 15, 1960, United States-Republic of China, 13 U.S.T. 2155, T.I.A.S. No. 5176; Defense Agreement Concerning Construction of Scatter Wave Control Facility in Vicinity of Yangmingshan, Taiwan, Feb. 28, 1962, United States-Republic of China, 13 U.S.T. 2158, T.I.A.S. No. 5177; Agreement Concerning the Status of United States Armed Forces in the Republic of China, Aug. 31, 1965, United States-Republic of China, 17 U.S.T. 373, 375, T.I.A.S. No. 5986 (Art. III.3); Agreement Concerning the Status of United States Personnel and Property (Annex), May 8, 1951, United States-Iceland, 2 U.S.T. 1533, 1542, T.I.A.S. No. 2295 (Art. VI); Agreement Concerning

106, the United States has entered into several additional international agreements that afford hiring preferences to citizens of host countries but are not Article II treaties.[3] We are advised by the Department of State that no Article II treaty ever has

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Bahamas Long Range Proving Ground: Administrative Arrangements Regarding Sites in Ascension Island, Aug. 24-25, 1959, United States-United Kingdom, 10 U.S.T. 1453, 1454, T.I.A.S. No. 4296; Agreement Concerning Oceanographic Research Stations in the Bahama Islands, May 12, 1960, United States-United Kingdom, 11 U.S.T. 1405, 1406, T.I.A.S. No. 4479; Agreement Concerning Atlantic Undersea Test and Evaluation Center in the Bahama Islands, Oct. 11, 1963, United States-United Kingdom, 14 U.S.T. 1431, 1441, T.I.A.S. No. 5441 (Art. IX); Agreement Concerning Defense Areas, Feb. 10, 1961, United States-West Indies, 12 U.S.T. 408, 413, T.I.A.S. No. 4734 (Art. VI); Agreement Concerning Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, United States-United Kingdom, 18 U.S.T. 28, 30, T.I.A.S. No. 6196 (¶ 7(a)); Memorandum of Understanding for the Establishment of the SEATO Clinical Research Center, Apr. 1 & 25, 1963, United States-Thailand, 14 U.S.T. 459, 462, T.I.A.S. No. 5340 (Art. IV.2), as amended; Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, United States-Australia, 14 U.S.T. 506, 520, T.I.A.S. No. 5349 (Art. 15).

[3] Agreement Implementing Article V of the Treaty of Friendship and Cooperation, Jan. 31, 1976, United States-Spain, 27 U.S.T. 3095, 3128, T.I.A.S. No. 8361 (Art. XXXIII); Agreement Concerning Defense Areas and Facilities, Dec. 14, 1977, United States-Antigua, 29 U.S.T. 4183, 4187, T.I.A.S. No. 9054 (Art. VI); Agreement Concerning a Tracking Station of Mahe Island, June 29, 1976, United States-Seychelles, 27 U.S.T. 3709, 3721, T.I.A.S. No. 8385 (Art. XXIII); Agreement for Cooperation on Defense and Economy between the United States and Turkey, Supplementary Agreement Number 3 on Installations, Mar. 29, 1980, Art. VI (not yet published).

addressed the subject of preferential hiring of local nationals at military facilities used by the United States abroad.

3. In March 1978, respondents Rossi, Bumgarner, Frierson and Perry were notified that their jobs as game room managers at the United States Naval Facility at Subic Bay were being converted to local national positions in accordance with Article I of the BLA and that they would be discharged from their employment with the Navy (App. B, *infra*, 21a). Respondent Rossi filed what he styled as a "class action" administrative complaint, alleging that the Navy's termination of respondents constituted unlawful discrimination against American citizens in violation of Section 106 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (App. B, *infra*, 22a; A. 226-232).[4] The Equal Employment Opportunity Office of the Navy rejected the complaint, concluding that it had no authority to modify the BLA (App. C, *infra*, 41a-45a). In June 1978, respondent Rossi appealed to the Civil Service Commission Appeals Review Board (A. 233).

While the administrative appeal was pending, the four respondents were notified that their employment was to be terminated ahead of schedule pursuant to a reduction in force (App. B, *infra*, 23a). Asserting jurisdiction under the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(3), and 28 U.S.C. 1331(a) and 1343(4), respondents sought a temporary restraining order enjoining petitioners from discharging them and barring them from the base. The United States District Court for the District of Columbia granted the restraining order, but subsequently de-

[4] "A." refers to the joint appendix filed in the court of appeals.

nied respondents' motion for a preliminary injunction (App. B, *infra*, 23a).

On cross motions for summary judgment, the parties agreed that the validity under Section 106 of respondents' discharge depended on whether the word "treaty" encompasses binding international agreements such as the BLA or is limited to treaties in the constitutional sense—*i.e.*, agreements consented to by the Senate in accordance with Article II. The district court concluded that "treaty" as used in Section 106 should be construed in the broader international law sense (App. B, *infra*, 20a-39a). The court rejected respondents' contention that Congress' mere use of the word "treaty" in the statute is dispositive, noting (*id.* at 29a) that several courts, including this Court (see *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912)) "have held that executive agreements were 'treaties' within the meaning of an Act of Congress," and that Congress' imprecise drafting of Section 106 buttressed the conclusion that the word was not intended to have a restricted meaning (App. B, *infra*, 30a). In addition, the court found (*id.* at 33a-34a) that "the legislative history would argue against [respondents'] contention that Congress intended to ban all discrimination on military bases abroad, even when pursuant to an agreement between nations."

In reaching this conclusion, the district court recognized (App. B, *infra*, 37a) that it was treading "in an area fraught with sensitivity and affecting foreign affairs of the United States." The court observed (*id.* at 36a) that there were 12 international agreements with hiring preferences for local nationals at overseas American bases in effect when Section 106 was passed, that none of these agree-

ments had been submitted to the Senate for its advice and consent, and that two more such agreements were added after the enactment of Section 106. Because these hiring preference provisions were part of the *quid pro quo* for the retention of American use of military facilities in foreign countries, the court concluded that it "should not lightly infer a Congressional intent to overturn portions of fourteen international agreements in the absence of *any* legislative history suggesting such an intent" (*id.* at 37a; emphasis in original).[6]

4. The court of appeals reversed (App. A, *infra*, 1a-19a). The court of appeals acknowledged (*id.* at 8a-9a; footnote omitted) that "although the term 'treaty' under United States law normally connotes an agreement requiring the ratification of the Senate under article II of the Constitution, * * * it does not invariably carry such a meaning" and that "[t]he meaning to be attributed to the word 'treaty' ultimately depends upon the intent of Congress in enacting the particular provision in which the term appears." The court of appeals also observed, after a review of the legislative history, that "the evidence [of congressional intent] is not extensive" (*id.* at 14a). Nonetheless, the court concluded that Congress used the word "treaty" in Section 106 in its Article II sense and that it accordingly intended, *sub silentio*, to abrogate local preferential hiring provisions in

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[6] Based on its conclusion that the BLA is a "treaty" within the meaning of Section 106, the district court also held (App. B, *infra*, 37a-38a) that the specific provision in Section 106 permitting discrimination against American citizens in employment at overseas bases controls over the more general prohibitions against employment discrimination in Title VII. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974).

more than a dozen existing international agreements. In the court's view (App. A, *infra*, 15a n.30), Section 106 partially repealed the 1944 Act authorizing the President to negotiate and conclude agreements with the Philippines "by such means as he finds appropriate" (see page 3, *supra*), by withdrawing one method as inappropriate—agreements to employ local nationals in preference to United States citizens or dependents of United States service members for civilian positions on overseas military bases, unless such agreements were consented to by two-thirds of the Senate.[6]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals invalidates a key provision of this country's Base Labor Agreement with the Republic of the Philippines and threatens the security and continued existence of United States military bases in that nation. Moreover, the decision below casts doubt on a dozen other international agreements containing local national employment preferences that were negotiated by the President as part of an effort to maintain an American military presence on foreign soil. This holding, if allowed to stand, could seriously disrupt United States relations with several foreign countries. Because it is unlikely that Congress would have intended these drastic results without saying so, and because the decision below is inconsistent with rules of statutory construction that have been well established by this Court, further review is warranted.

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[6] In view of its conclusion that the BLA is not a "treaty" within the meaning of Section 106, the court of appeals did not address the question whether the BLA hiring preference provision violates Title VII (App. A, *infra*, 19a n.36).

1.a. Although the court of appeals purported (App. A, *infra*, 5a) to base its decision in part on the "[c]ustomary usage of the term 'treaty' in the United States," it correctly concluded (*id.* at 9a) that Congress' use of the word "treaty" in Section 106 was not dispositive of the issue before it. Thus, while the court remarked (*id.* at 7a) that "under United States law, 'treaties' normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status," it acknowledged (*id.* at 8a-9a; footnote omitted) that the word "treaty" "does not invariably carry such a meaning." The question is solely one of legislative intent.[7]

In *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), for example, this Court considered whether the word "treaty" in the Circuit Court of Appeals Act of 1891, 26 Stat. 826, 828, which provided for direct appeal to this Court in cases involving the construction of treaties, included international agreements not consented to by the Senate. The agreement in question, which concerned important commercial relations between the United States and France, had not been submitted to the Senate for approval pursuant to Article II of the Constitution. In holding that the agreement nonetheless was a "treaty" for purposes of the Circuit Court of Appeals Act, the

[7] Courts also sometimes use the word "treaty" in its broader international law sense rather than its constitutional sense. See, *e.g.*, *Natural Resources Defense Council* v. *NRC*, No. 80-1477 (D.C. Cir. Mar. 30, 1981), slip op. 14 n.15, in which Judge Wilkey (author of the opinion below) used the word "treaty" to refer to the Agreement for Cooperation Concerning Civil Uses of Atomic Energy, June 13, 1968, United States-Philippines, 19 U.S.T. 5389, T.I.A.S. No. 6522, which is not an Article II treaty.

Court looked to the legislative intent and concluded that Congress "thought [it] best to preserve the right to a review by direct appeal * * * in certain matters of importance, and, among others, those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations *of that character* to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation" (224 U.S. at 600-601; emphasis added).

Similarly, this Court has held that "all international compacts and agreements" are to be accorded a dignity similar to that of a treaty made with the advice and consent of the Senate for the purpose of determining whether state law can prevail over an international agreement. *United States* v. *Pink*, 315 U.S. 203, 222-223 (19[illegible]); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). In *Pink* and *Belmont*, the Court held that the Litvinov Assignment, by which the Soviet Union assigned certain claims to the United States as part of this nation's recognition of the Soviet government, although not approved by the Senate, had the effect of a treaty, thus making it supreme over the hostile laws and policy of New York State.

The Court of Claims also has construed international agreements as treaties for purposes of 28 U.S.C. 1502, which provides that that court shall not have jurisdiction over claims against the United States "growing out of or dependent upon any treaty entered into with foreign nations." See *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889, 903 & n.17

(Ct. Cl. 1976); *Yassin* v. *United States*, 76 F. Supp. 509, 517 (Ct. Cl. 1948). The Court of Claims explained that "[t]he reason for this equation is that the fundamental separation-of-powers policy underlying § 1502, *i.e.*, to avoid undue judicial interference (*e.g.*, by construction of particular treaty terms and provisions) with the Executive Branch's conduct of foreign relations, is equally applicable to both forms of international compact." *Hughes Aircraft Co.* v. *United States*, *supra*, 534 F.2d at 903 n.17.

b. In light of this Court's decision in *B. Altman*, the court of appeals correctly concluded that Congress' use of the term "treaty" in Section 106 was not dispositive (App. A, *infra*, 9a). The court of appeals therefore based its holding on the concededly sparse legislative history. That legislative history, however, does not bear the court's reading of it. Indeed, the legislative record is more significant for what it does not contain—*any* expression of a congressional intent to abrogate the numerous existing agreements with allies providing preferences for the hiring of local nationals.

At the time Section 106 was enacted, at least 14 binding international agreements, none of which had been submitted to the Senate for approval, provided for local national hiring preferences or labor protections at military facilities in foreign countries used by the United States.[8] Nowhere in the legislative history of Section 106 is there any mention of these existing international agreements or any discussion of the impact that Section 106 would have on them. Nor was there any testimony concerning the anti-discrimination provision from the Department of

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[8] See note 2, *supra*.

State or the Department of Defense, as there surely would have been had the validity of the existing international agreements been subject to challenge. Perhaps more important, Congress obviously felt the need to include an exception for "treaties" in Section 106, yet the Article II format had never been employed to establish local national hiring preferences at military bases used by the United States abroad. Congress' failure to discuss the impact that Section 106 would have on the international agreements then in force, combined with the absence of any Article II treaties addressing the hiring preference issue, strongly suggests a legislative understanding that all agreements negotiated by the President and having the force of law in the international arena would be exempt from Section 106 by virtue of the "treaty" exception.[9]

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[9] Since the enactment of Section 106 in 1971, the United States has entered into at least four more international agreements that are not in the form of Article II treaties but that contain local national hiring preferences (see note 3, *supra*). Each of these agreements was submitted to Congress under the Case Act, 1 U.S.C. (Supp. III) 112b, which requires the Secretary of State to transmit to Congress any international agreement other than an Article II treaty to which the United States is a party (see note 11, *infra*). No Member of Congress has expressed concern to the Department of State that these agreements run afoul of Section 106.

Other post-enactment legislative history also shows that Congress is aware that the inclusion of hiring preferences in international agreements that have not been approved by the Senate has continued since the passage of Section 106. See, *e.g.*, H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 80 (1978) ("[f]oreign nationals are employed either directly or indirectly in virtually all countries where U.S. forces are deployed. The United States and the host country have administrative agreements (referred to as Status of Forces

Further evidence of Congress' intent is supplied by the scant legislative history that does exist. The provision that became Section 106 was part of an amendment to Pub. L. No. 92-129 sponsored by Senators Hughes and Schweiker. The amendment was generally concerned with reducing the extension of the draft and increasing military pay. The limited debate over Section 106 indicates that the provision apparently was prompted by a single incident that occurred in Europe. In early 1971, in an effort to reduce "spiraling wage costs," the Commanding General of the European Exchange System (EES), Gen. Charles H. Phipps, issued a statement encouraging all EES elements to recruit and hire local nationals. See 117 Cong. Rec. 14394-14397 (1971) (remarks of Sen. Schweiker); *id.* at 16128, 16133 (remarks of Sen. Schweiker).

Senator Schweiker's discussion of Section 106 focused on the Phipps memorandum and on the plight of American servicemen in Germany's expensive economy. 117 Cong. Rec. 14394-14397, 16128-16129, 16131-16133 (1971). These remarks indicate outrage at General Phipps' unilateral action, which Senator Schweiker viewed as insensitive to the economic circumstances of American soldiers and their families. General Phipps' action, however, was not mandated by any international agreement; indeed, it violated the Department of Defense policy embodied in the Dependent Hire Program. See also 117 Cong. Rec. 16133 (1971) (remarks of Sen. Schweiker). In addition, Senator Schweiker expressed

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Agreements) which define and prescribe requirements that the military departments are obligated to observe in satisfying their local civilian labor needs"). No legislative action has been taken, however, to alter that situation.

no intent to abrogate any international agreement calling for local national hiring preferences.

Moreover, the debates contain no mention of the local hiring situation in military installations used by the United States in countries outside of Europe. Specifically, there was no discussion of the bases in the Philippines or the hiring preference required by the BLA. This is not surprising, because Congress' concern with servicemen's cost of living in Europe, which is clearly reflected in the debates, would have had no application to the Philippines, where the cost of living is far below that in Europe.[10]

In support of its conclusion that Congress intended to eliminate all local hiring preferences, even if embodied in existing international agreements, the court of appeals relied primarily on a statement by Senator Hughes (App. A, *infra*, 14a) that wives of servicemen "are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located * * *" (117 Cong. Rec. 16126 (1971)). But this isolated reference to "agreements," when viewed in context, refers not to local national hiring preferences (such as the BLA) extended pursuant to international agreements, but rather to provisions concerning the visa status of American military dependents. Senator Hughes' remark immediately follows his observation (*ibid.*) that servicemen "in the lowest ranks cannot have their wives obtain anything but a tourist visa" and

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[10] The committee reports' only mention of Section 106 is the statement that "[t]he purpose of this amendment is to correct a situation which exists *primarily on some American bases in Europe.*" S. Rep. No. 92-93, 92d Cong., 1st Sess. 23 (1971) (emphasis added); accord, H.R. Conf. Rep. No. 92-433, 92d Cong., 1st Sess. 31 (1971).

echoes Senator Cook's comments on the same point (*ibid.*):

> On my inquiry of the Defense Department, it was my understanding that there was an agreement, through the NATO organization, that those young wives, because they were there on tourist visas, could not get a work permit under any circumstances.

These concerns, as Senators Cook and Hughes recognized (117 Cong. Rec. 16126 (1971)), are distinct from the unilateral exhortation by General Phipps to hire local nationals, the incident that triggered the enactment of Section 106, and Section 106 does not purport to cover the visa problem (*ibid.*). The visa status of military dependents in the host country is a different question entirely from the employment preferences mandated by international agreements. Even if dependent spouses and children could obtain a work permit, that would not change the requirement under the BLA or similar international agreements that certain positions on the base must be made available to citizens of the host country. Senator Hughes' statement thus is irrelevant to the problem addressed by Section 106 and sheds no light on the proper interpretation of the word "treaty." [11]

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[11] The court of appeals also relied (App. A, *infra*, 16a-18a) on the fact that the same Congress that enacted Section 106 also passed the Case Act, 1 U.S.C. 112b, which, as originally enacted, required the Secretary of State to submit to Congress "the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has been entered into force with respect to the United States but in no event later than sixty days thereafter." But Congress' use of the word

c. The court of appeals' conclusion that Section 106 indicates a congressional intent to abrogate important provisions of several international agreements not only is based on an erroneous reading of the legislative history but also ignores the settled rule of statutory construction that repeals by implication are not favored. *United States* v. *Will*, No. 79-983 (Dec. 15, 1980), slip op. 20; *TVA* v. *Hill*, 437 U.S. 153, 189 (1978). As the Court remarked in *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974):

> The courts are not at liberty to pick and choose among congressional enactments, and

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"treaty" in the Case Act is not controlling in this wholly different context.

First, it is hardly surprising that Congress would distinguish between Article II treaties and other international agreements in a statute requiring the submission of documents by the Executive, because submission of the former category of documents to the Senate was already required by the Constitution. Moreover, while the court below admitted (App. A, *infra*, 17a) that "the general subject matter treated in the two enactments is not the same," it drew on what it thought "may have been" "a similar concern" of both statutes, that is, a congressional desire to check presidential power (*ibid.*). Such a concern does not appear to have played a part in the enactment of the Case Act (see 118 Cong. Rec. 4090-4091 (1972) (remarks of Sen. Case); *id.* at 4093 (remarks of Sen. Bentsen) ("[w]e do not want to tie the President's hands in his efforts to engage in foreign policymaking")), which, after all, only requires notice to Congress of international agreements *after* they have been concluded. In any event, there is no basis for assuming that a desire to check presidential power was the motivation for Section 106. It is unreasonable to believe that Congress, which was aware that most status of forces agreements with foreign nations were not in the form of Article II treaties, would have sought to control the executive branch by requiring only that one particular issue usually dealt with in such agreements must be in the form of an Article II treaty.

> when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

The foregoing principle applies with special force where the allegedly repealed provision is a binding international obligation. This Court long ago held that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *." *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See also *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953). In the absence of a clear legislative intent, statutes thus are to be construed so that they do not conflict with existing provisions or obligations under Article II treaties or other agreements with foreign countries. See *Moser* v. *United States*, 341 U.S. 41, 45-46 (1951); *Clark* v. *Allen*, 331 U.S. 503, 510, 514 (1947); *Cook* v. *United States*, 288 U.S. 102, 120 (1933); *Restatement (Second) of Foreign Relations of the United States*, § 145, Comment b (1965); L. Henkin, *Foreign Affairs and the Constitution* 171 (1972).

The court of appeals disregarded these principles in holding that Congress intended Section 106 to amend the 1944 statute authorizing the President to negotiate "by such means as he finds appropriate" for the acquisition of military and naval bases in the Philippines and to abrogate important obligations of the United States to several other foreign nations.

Indeed, in contrast to the district court's sensitivity to these considerations, the court of appeals never even adverted to the adverse impact its decision would have on the United States' ability to negotiate and maintain crucial rights to use military facilities overseas, finding that these obligations were "exactly what Congress intended to nullify" (App. A, *infra*, 16a). Contrary to the court of appeals' conclusion, however, we submit that the legislative history of Section 106 falls far short of a "clear and manifest" congressional intent to abrogate this nation's international commitments.

2. As the district court noted (App. B, *infra*, 36a), the employment of local nationals is a significant *quid pro quo* for foreign countries to allow the United States to use military bases located on their soil. This is particularly true in the case of the Philippines. As the Department of State remarked in 1977, the question of civilian employment at the United States bases in the Philippines "has long been a sensitive one. The Government of the Philippines believes that at military bases on Philippine territory it is appropriate that Filipino citizens be employed to the maximum extent possible. The Government of the Philippines has been adamant on that point, and the limited exceptions provided for in Article I of the Base Labor Agreement are the only concessions it has been willing to grant in this respect." Letter from Kempton B. Jenkins, Acting Assistant Secretary of State for Congressional Relations, to Senator Henry M. Jackson, dated Feb. 7, 1977 (A. 211).

The court of appeals' ruling in this case has already sparked a hostile reaction in the Philippines. For example, an editorial in the Manila Evening

Post (Oct. 2, 1980), published shortly after the decision below, stated:

> The action of the U.S. Appellate Court, in taking exception to the validity of the executive agreement on the hiring of Filipino workers for U.S. military bases in this country, is unfortunate and if followed by the U.S. government will most certainly place the bigger question of the agreement, not a treaty, on the activation of U.S. military bases here, in peril. In effect, the Appellate Court's decision puts the U.S. out on a limb as far as the presence of U.S. bases here is concerned.
>
> * * * * *
>
> Certainly, this country will have every right to end the agreement if one of its most important provisions is nullified.[12]

Thus, the court of appeals' decision, unless reversed, will hamper the United States' ability to negotiate for and maintain base rights and other military advantages in the Philippines and elsewhere.[13] These

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[12] The United States employs more than 13,000 Filipino citizens at its military facilities in the Philippines. Department of Defense Total Civilian Personnel Strengths By Regional Area and By Country—Military Functions Summary (Dec. 31, 1980), Table P309B, at 2. The Department of the Navy advises that the decision of the court of appeals has not escaped the notice of Filipino labor leaders, who have called for strikes if the job security of the local nationals employed at the military facilities is threatened. We note that the ship repair facility at Subic Bay is of vital importance to the readiness of the Seventh Fleet and Indian Ocean task forces that defend American interests in the Middle East, the Indian Ocean and the Pacific. Labor unrest at Subic Bay thus would have a direct and significant adverse impact on the United States' ability to respond militarily in this potentially volatile area.

[13] The Article II treaty process is time consuming and may not be feasible in some situations. Moreover, the Department

serious adverse consequences warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1981

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of State advises that foreign countries frequently may wish to avoid the formality and high visibility of a treaty. The decision below, which would require every international agreement containing local national hiring preference provisions to be in the form of an Article II treaty, thus substantially reduces negotiating flexibility.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1485

ANTHONY M. ROSSI, *et al.*, APPELLANTS

v.

HAROLD BROWN, Secretary of Defense, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 78-2346)

Argued 15 April 1980

Decided 15 September 1980

Before: MCGOWAN and WILKEY, *Circuit Judges*, and DAVIES *, *Senior United States District Judge* for the District of North Dakota.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: Section 106 of Public Law No. 92-129 prohibits discrimination against United States citizens in the employment of civilian person-

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

nel on United States military bases overseas, unless such discrimination is permitted by "treaty."[1] This case presents the narrow question of whether the Base Labor Agreement of 1968 between the United States and the Republic of the Philippines,[2] which provides for preferential hiring of local nationals at United States military bases in the Philippines, is a "treaty" within the meaning of section 106.

Resolution of this question turns on whether the word "treaty" set forth in the statute is intended to refer only to international agreements entered into by the President with the advice and consent of two-thirds of the Senate or whether it refers in a broader sense to any international agreement entered into between the United States and the governments of other nations. The district court concluded that the latter interpretation was correct and accordingly entered summary judgment for the Government.[3] We reverse, finding on the basis of the plain language of the statute and the legislative history that the term "treaty" was used in the sense set forth in article II of the Constitution—that is, an international agreement made by the President with the advice and consent of two-thirds of the Senate.

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[1] *See* Act of 28 Sept. 1971, Pub. L. No. 92-129, § 106, 85 Stat. 348, 355 (codified at 5 U.S.C. § 7151 note (1976)). For text of the provision, see text accompanying note 7 *infra*.

[2] The official title of the agreement is the Agreement Relating to the Employment of Philippine Nationals in the United States Military Bases in the Philippines, 27 May 1968, United States-Philippines, [1968] 19 U.S.T. 5892, T.I.A.S. No. 6542, *reprinted in* Joint Appendix (J.A.) at 170. The agreement more commonly is known as the Base Labor Agreement, and that usage will be followed here. For text of the relevant portion of the agreement, see text accompanying note 5 *infra*.

[3] *See Rossi* v. *Brown*, 467 F. Supp. 960 (D.D.C. 1979).

I. BACKGROUND

The essential facts are not in dispute; we review them briefly here.[4]

Article 1 of the Base Labor Agreement of 27 May 1968 between the United States Government and the Republic of the Philippines provides:

> The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed.[5]

In March 1978 four of appellants, who are United States citizens residing in the Philippines, were informed that pursuant to this agreement their positions as gameroom managers at the United States Naval Station, Subic Bay, in the Republic of the Philippines, thereafter would be filled only by Philippine citizens. Appellants subsequently filed an administrative complaint with an Equal Employment Opportunity Counselor challenging the validity of this action.

After failing to prevail at the administrative level, appellants on 13 December 1978 filed a complaint in the United States District Court alleging that the

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[4] *See id.* at 961-62.

[5] Base Labor Agreement, 27 May 1968, United States-Philippines, art. I, [1968] 19 U.S.T. 5892, 5892-93, T.I.A.S. No. 6542, *reprinted in* J.A. at 170, 170-71.

provision set forth in the Base Labor Agreement for hiring Filipino citizens in preference to United States citizens plainly contradicts section 106, Public Law 92-129 (Hughes-Schweiker amendment).[6] Section 106 provides in pertinent part:

> *Unless prohibited by treaty*, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States.[7]

Whether the preferential hiring mandate of the Base Labor Agreement is nullified by the qualified ban on employment discrimination against United States citizens set forth in section 106 necessarily depends upon the construction accorded to the word "treaty." Appellants contended below that Congress used the word "treaty" in section 106 in the sense set forth in article II of the Constitution: an international agreement made by the President with the advice and consent of two-thirds of the Senate. Under this construction, the parties agree, the Base Labor Agreement is not a treaty. The President never submitted the agreement to the Senate for ratification. Rather, it was negotiated by the President pursuant to a congressional authorization of 1944 to use "such means as he [the President] finds appropriate" to acquire and retain military bases in

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[6] Act of 28 Sept. 1971, Pub. L. No. 92-129, § 106, 85 Stat. 348, 355 (codified at 5 U.S.C. § 7151 note (1976)).

[7] *Id.* (emphasis added).

the Philippines.[8] The district court, however, agreed with the Government's contention that Congress intended the scope of the term "treaty" to encompass any binding agreement entered into between the United States and other nations. Accordingly, the court held that the Base Labor Agreement of 1968 was a "treaty" for purposes of section 106.

We reverse. Customary usage of the term "treaty" in the United States and the legislative history of section 106 persuade us of the validity of appellants' position.

II. ANALYSIS

A. *Customary Usage in the United States*

Under principles of international law, the word "treaty" ordinarily is used to refer to "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[9] The designation of "treaty" under in-

[8] The relevant portion of the Act provides: "After negotiation with the President of the . . . Philippines . . ., the President of the United States is authorized by such means as he finds appropriate to withhold or to acquire and to retain such bases, necessary appurtenances to such bases, and the rights incident thereto." Act of 29 June 1944, ch. 322, § 2, 58 Stat. 625, 626 (codified at 22 U.S.C. § 1392 (1976)). Pursuant to this statutory authorization, the United States and the Philippines entered into the Military Bases Agreement of 1947, United States-Philippines, 61 Stat. 4019, T.I.A.S. No. 1775, which has been the subject of periodic renegotiation, as well as the Base Labor Agreement, 27 May 1968, United States-Philippines, [1968] 19 U.S.T. 5892, T.I.A.S. No. 6542, *reprinted in* J.A. at 170.

[9] Vienna Convention on the Law of Treaties, 22 May 1969, art. 2(1)(a), *reprinted in* 63 AM. J. INT'L L. 875, 876 (1969). As the drafters of the Restatement of the Foreign Relations

ternational law thus encompasses within its scope all binding agreements entered into between nations regardless of the manner by which these agreements are brought into force.

Under the United States Constitution, the term "treaty" has a more specific and restricted meaning. Article II, section 2, clause 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." [10] It is without question that the President may enter into binding agreements with other nations without the advice and consent of the Senate,[11] and these types of agreements commonly are called "executive agreements." [12] Executive agreements are "treaties" under established canons of international law, but not under article II of the Constitution.

This distinction between treaties and other forms of international agreements is followed in the draft Restatement of the Foreign Relations Law of the United States. Section 302 of the Restatement provides:

Law of the United States state, "[I]nternational law does not distinguish between agreements designated as 'treaties' and other agreements." RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory note 3, at 74 (Tent. Draft 1 Apr. 1980).

[10] U.S. CONST. art. II, § 2, cl. 2.

[11] *See, e.g., United States* v. *Belmont*, 301 U.S. 324, 330-32 (1937); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *B. Altman & Co.* v. *United States*, 224 U.S. 583, 600-01 (1912).

[12] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 178 (1972).

§ 302. Definitions: Law of the United States

(a) "Treaty" means an international agreement made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring.

(b) Other international agreements, some times collectively referred to as "international agreements other than treaties," include "executive agreements pursuant to treaty," "Congressional-executive agreements [*i.e.*, executive agreements pursuant to congressional authorization] and "sole executive agreements." [13]

Thus under United States law, "treaties" normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status. According to this usage, the Base Labor Agreement at issue is an executive agreement, or more specifically, a "Congressional-executive agreement" [14]—that is, an international compact concluded by the President pursuant to congressional authorization to use "such means as . . . appropriate" to acquire and retain military bases in the Philippines—but not a "treaty."

In declining to apply this interpretation to section 106, the district court in part relied upon *B. Altman*

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[13] RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (Tent. Draft 1 Apr. 1980); *id.*, Introductory note 3, at 74.

[14] The Restatement defines the scope of a "Congressional-executive agreement" as follows: "The President may make an international agreement with the authorization or approval of Congress dealing with any matter that falls within the powers of Congress and of the President under the Constitution." *Id.* § 307.

& Co. v. *United States.*[15] In that case the Supreme Court construed the word "treaty" in the Circuit Courts of Appeals Act of 1891, which authorized a direct appeal to the Court in cases involving "the validity or construction of any treaty," [16] to encompass all international agreements regardless of the manner by which these agreements were brought into force. The Court relied upon the intent of Congress in establishing the provision: Congress deemed questions involving the interpretation of "treaties" to be of sufficient importance to justify direct review to the Court,[17] and the Court perceived no need to distinguish between treaties in the article II sense and other international agreements on that basis. All international compacts entailed binding rights and obligations, the construction of which could have significant bearing on this nation's relations with other nations.[18]

Thus although the term "treaty" under United States law normally connotes an agreement requiring the ratification of the Senate under article II of the Constitution, *Altman* indicates that it does not

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[15] 224 U.S. 583 (1912).

[16] Act of 3 Mar. 1891, ch. 517, § 5, 26 Stat. 826, 828 (originally codified at 28 U.S.C. § 345 (1926)).

[17] *See B. Altman & Co.* v. *United States,* 224 U.S. at 600.

[18] *See id.* at 600-01. The Court stated:

> We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation.

Id. at 601.

invariably carry such a meaning.[19] The meaning to be attributed to the word "treaty" ultimately depends upon the intent of Congress in enacting the particular provision in which the term appears. We move, then, to an examination of the purpose underlying section 106.

B. *Legislative History*

The legislative history of section 106 is not extensive, but the purpose of the section clearly is set forth in both the Senate and Conference Committee Reports. The Conference Report, for instance, provides:

> The Senate version [of the bill] contained a provision prohibiting job discrimination against

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[19] We note, however, that the other case that the district court relied upon for this proposition, *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972), is inapposite. That case involved the question whether the Military Bases Agreement of 1947, United States-Philippines, 61 Stat. 4019, T.I.A.S. No. 1775, an executive agreement formulated pursuant to congressional authorization, provided a sufficient basis for the exercise of extradition powers by the executive branch. The Supreme Court in *Valentine* v. *United States*, 299 U.S. 5, 9 (1936), previously held that the executive possesses no power to extradite fugitive criminals except such as is conferred by treaty or by act of Congress. The Eighth Circuit construed *Valentine* to mean that there need only be "a showing of some authority, whether in the form of congressional dictate or policy, or the provisions of an existing treaty, to provide a legitimate basis for the surrender of fugitives" by the United States to another nation. *William* [*sic*] v. *Rogers*, 449 F.2d at 521. The court found that the executive agreement in question, resting on a valid delegation of legislative authority, constituted a sufficient basis for the exercise of extradition powers by the executive branch. The court thus did not address the question whether the agreement was a "treaty."

> American citizens and their dependents in hiring on United States military bases in any foreign country.
>
> . . . .
>
> The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men whose dependents are effectively prevented from obtaining employment.[20]

Concerned with the economic plight of American enlisted personnel and their dependents, Congress thus sought to eliminate the discrimination barrier preventing United States dependents from obtaining civilian positions on overseas military bases, unless such barrier expressly were authorized by "treaty."[21]

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[20] H.R. REP. No. 433, 92d Cong., 1st Sess. 31 (1971) (Conference Report). *See* S. REP. No. 93, 92d Cong., 1st Sess. 23 (1971).

[21] The exact language of the statute provides "[u]nless prohibited by treaty . . .," *see* text accompanying note 7 *supra*. The district court considered this language "confusing" and also "significant . . . in evaluating [appellants'] contention that Congress chose its words carefully and meant just what it said when it used the word 'treaty'." *Rossi* v. *Brown*, 467 F. Supp. 960, 965 (D.D.C. 1979). Replacing the phrase "[u]nless prohibited by" with either the words "unless permitted by" or "unless provided by" would convey more precisely the meaning of the statute, but we do not think that this awkward phrasing bears on congressional intent in selecting the word "treaty." That word is a term of art, the meaning of which Congress obviously was well aware.

What Congress really was saying by the words "[u]nless prohibited by treaty," as our review of the background of

After examining the legislative history and finding no explicit definition of the term "treaty," the district court was persuaded that Congress intended to eliminate discriminatory practices against American citizens arising only from ad hoc decisionmaking of individual commanders to give preference to local nationals and not from any international obligation on the part of the United States to hire local nationals; thus the district court interpreted the treaty exception to encompass all international agreements.

The court primarily based its conclusion upon the extended comments of Senator Schweiker, a sponsor of the amendment, concerning the policy of the commanding general of the Army Exchange System in Europe. The commanding officer in question issued a memorandum directing exchange system employees to hire local nationals rather than United States dependents or tourists because of the allegedly higher wage costs and higher turnover rates for United States citizens.[22] Decrying the general's action, Senator Schweiker stated at one point during the debates:

> I have never heard of anything so ridiculous in my life. We actually send our GI's to Europe

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the legislation makes clear, was "unless the Senate is consulted in regard to any permitted discrimination."

[22] The memorandum provides in relevant part:

> For the reasons outlined above, I desire that all European Exchange System elements in the months ahead emphasize the recruitment of local nationals and sharply de-emphasize the utilization of US dependents and tourists. Due to the high turnover in the latter category, I feel this transition can be made without actually separating any US personnel.

Memorandum from Brigadier General Charles Phipps (Jan. 1971), *reprinted in* 117 CONG. REC. 14,389, 14,395 (11 May 1971).

> at poverty wages. We do not pay to send the wives there. They [the GI's] get over there, and if they do bring their wives at their own expense, the wives cannot even go to the Army Exchange Service and get a job, because a general has sent out a memorandum that says we are going to give those jobs to the nationals of the countries involved.
>
> How ridiculous can one policy be? [23]

The court considered these and other similar comments on the commanding general's memorandum [24] to constitute the only significant discussion of section 106. The district court thus concluded that while the legislative history was not unambiguous, it credibly could be argued that "Congress had in mind only those instances of discrimination which resulted from the caprice of individual officers." [25]

We think that this is a constrained and erroneous view of congressional intent. First we note that the memorandum from the commanding general of the Army Exchange System was the only example referred to in the record of an officer issuing a mandate to discriminate against United States citizens in employment. And the debates later indicate that the Army had taken steps to ensure that this particular memorandum was rescinded.[26] While Con-

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[23] 117 CONG. REC. 14,389, 14,395 (1971) (remarks of Sen. Schweiker).

[24] *See, e.g., id.* at 14,397; *id.* at 16,120, 16,128 (remarks of Sen. Schweiker).

[25] *Rossi* v. *Brown*, 467 F. Supp. 960, 967 n.4 (D.D.C. 1979).

[26] This brings me to one more point. Since uncovering the memorandum I brought out a few days ago and read again today, whereby the commanding general of the

gress undoubtedly may have wished to prevent situations of this kind from arising in the future, that the particular problem referred to by Senator Schweiker was already being resolved, at least suggests that Congress by enacting section 106 had more in mind than just "the caprice of individual officers." Further scrutiny of the legislative record confirms this supposition.

At the time section 106 was being considered, twelve international agreements were in effect providing for preferential hiring of local nationals on United States military bases. None of these agreements had been submitted to the Senate for ratification.[27] In discussing the economic hardships facing

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European exchange system, General Phipps, had recommended that only local nationals be considered for these jobs, the Assistant Secretary of the Army, Roger Kelley, has personally taken over the investigation of this matter. He has assured me that they are going to rectify that particular memorandum, that that memorandum will from now on correspond to the alleged policy that has been operating over there for some time, of giving American nationals some preference.

117 CONG. REC. 16,120, 16,133 (1971) (remarks of Sen. Schweiker). Since 1961, as a later passage indicates, the official policy of the Department of Defense was to hire United States dependents to the maximum extent possible for civilian positions on overseas military bases. *See id.* The directive from the commanding general of the European Exchange System thus ran expressly contrary to official policy.

[27] *See, e.g., Rossi* v. *Brown*, 467 F. Supp. 960, 967-68 (D.D.C. 1979); Brief for Appellees at 19-20 & n.20. Since 1971 the United States has entered into two additional agreements with other countries which provide for preferential hiring of local nationals. Neither of these agreements has been ratified by the Senate. *See, e.g., Rossi* v. *Brown*, 467 F. Supp. 960, 968 (D.D.C. 1979).

American servicemen and their families, Senator Hughes, the other sponsor of the amendment, specifically referred to these agreements: "[T]hey [dependents of enlisted personnel] are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located*, and are forced to live in poverty."[28] Although the evidence is not extensive we take this statement on the part of a cosponsor of the amendment to be an unmistakable indication that Congress intended to abrogate those portions of the existing executive agreements providing for preferential hiring of local nationals.[29]

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[28] 117 CONG. REC. 16,120, 16,126 (1971) (remarks of Sen. Hughes) (emphasis added). The Government argues that Senator Hughes' statement probably refers to informal agreements by local base commanders with the host countries to give local nationals preference in hiring. *See* Brief for Appellees at 18 n.17. The record reflects, however, only one instance of a commanding officer directing the employment of local nationals in lieu of United States citizens, and this policy was formulated unilaterally by the officer, *see* note 23 *supra* and accompanying text—not by any "agreement" with the host country. Thus we think the word "agreement" plausibly could only be a reference to the international agreements providing for discrimination against United States citizens.

We note also that the preferential hiring policy of local nationals was only one obstacle preventing United States dependents from obtaining civilian positions on overseas military bases. In his remarks, Senator Hughes also expressed concern that the wives of enlisted men were unable to secure work permits in foreign countries. *See* 117 CONG. REC. 16,120, 16,126 (1971) (remarks of Sen. Hughes) ("[t]hose in the lowest ranks cannot have their wives obtain anything but a tourist visa").

[29] Senator Schweiker also quoted from a study prepared by two Army officers, which referred to the classification of civilian jobs for local nationals as one factor contributing to the economic hardship of United States enlisted men:

Thus we think that Congress sought to eliminate discrimination against American citizens owing not just to the ad hoc decisionmaking of particular commanders, but also owing to executive agreements between the United States and other countries providing for preferential hiring of local nationals. And *consistent with this purpose, Congress could only have intended the "treaty" exception to include an agreement made by the President with the advice and consent of two-thirds of the Senate.*[30]

The district court felt constrained to apply a broad construction to the word "treaty" in section 106 in

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Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. These jobs are classified as local national jobs and American dependents cannot fill the jobs because of this classification.

117 CONG. REC. 16,120, 16,132 (1971).

Senator Schweiker commented: "I bet we are the only country in the world that has that unique method of discriminating against [our] enlisted personnel stationed abroad." *Id.*

[30] This view coincides with the interpretations of the General Accounting Office (GAO), *see* Letter from H. L. Krieger, Director of GAO, to Tony Rossi (21 Aug. 1978) (incorporating Letter from H. L. Krieger, Director of GAO, to Secretary of Defense (27 July 1976)), *reprinted in* J.A. at 203, and, until 1977, of the Department of State, *see, e.g.*, Letter from James H. Michel, Deputy Legal Adviser, Department of State, to Earl J. Silbert, United States Attorney (21 Dec. 1978), *reprinted in* J.A. at 212.

Although Congress in 1944 authorized the President to negotiate and conclude agreements "by such means as he finds appropriate," *see* note 8 *supra*, we think that in 1971 Congress withdrew one method as inappropriate—agreements to employ local nationals in preference to United States citizens for civilian positions on overseas military bases—unless such agreements were ratified by two-thirds of the Senate.

part because the interpretation urged by appellants presumably would invalidate the preferential hiring provisions of fourteen international agreements entered into by the President without the advice and consent of the Senate.[31] Because these agreements were entered into "with the understanding that the hiring of local nationals when possible would be part of the *quid pro quo* for the retention by the United States of military bases in the host country,"[32] the court was concerned that abrogation of the preferential hiring provisions would have uncertain repercussions in the conduct of foreign affairs. While we understand the district court's concern, after examining the legislative history we are convinced that Congress was aware of the existence of international agreements providing for preferential hiring of local nationals, and that this was exactly what Congress intended to nullify. We must not overlook the fact that Congress has not been consulted on the agreements.

We might also add that legislation enacted contemporaneously with section 106 supports our conclusion that Congress intended a clear distinction between treaties requiring the ratification of the Senate and other forms of international agreements. In particular, the Case Act makes such a distinction, providing that the executive branch "shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agree-

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[31] *See* note 27 *supra*.

[32] *Rossi* v. *Brown*, 467 F. Supp. 960, 968 (D.D.C. 1979).

ment has entered into force with respect to the United States." [33]

The district court declined to read section 106 *in pari materia* with the Case Act on the ground that the statutes did not deal with the same subject matter.[34] Although the general subject matter treated in the two enactments is not the same, Congress used precisely the same word in both, suggesting at least that if Congress had intended a more expansive scope for the exception to the ban on discrimination in section 106, it easily could have chosen the term "international agreement" rather than the word "treaty." Moreover we think a similar concern may have been present in both statutes. As a check on the President's power, Congress, in the Case Act, sought to ensure that the legislative branch received timely notice of all international agreements.[35] By

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[33] Act of 22 Aug. 1972, Pub. L. No. 92-403, § 112b, 86 Stat. 619 (codified at 1 U.S.C. § 112b (1976)). The Department of State relied upon the Case Act in its opinion issued in 1975 that the Base Labor Agreement was *not a treaty* for purposes of section 106. *See* Letter from John A. Boyd, Acting Assistant Legal Adviser for Treaty Affairs, to James E. Masterson, Assistant General Counsel, GAO, at 4 (8 Aug. 1975), *reprinted in* J.A. at 220, 223. Senate Resolution 214 also provides that agreements with Portugal or Bahrain for military bases should be negotiated through treaties submitted to the Senate for ratification rather than through executive agreements. *See* S. REP. No. 632, 92d Cong., 2d Sess. 1 (1972).

[34] *See Rossi* v. *Brown*, 467 F. Supp. 960, 967 (D.D.C. 1979).

[35] An attempt to exert some check on the President's power also prompted the passage of Senate Resolution 214, which required that agreements with Portugal or Bahrain for military bases be negotiated through treaties submitted to the Senate, *see* note 33 *supra*. The Senate Report provides, for

enacting section 106, we think that Congress also wanted to exercise some control over whether United States citizens would be discriminated against in the employment of civilian personnel on overseas military bases. We recognize that the usage in contemporaneous legislation is not dispositive in this case; still, we think it weighs in favor of the view that Congress also intended the term "treaty" in section 106 to mean an agreement made by the President with the advice and consent of two-thirds of the Senate.

III. Conclusion

In conclusion, we are persuaded that the word "treaty" in section 106 was used in the sense set forth in article II of the Constitution—an international agreement concluded by the President with the advice and consent of two-thirds of the Senate. This construction is consistent with the terminology normally used under United States law. It also comports with congressional intent to alleviate the economic plight of United States military personnel and their dependents; if we were otherwise to construe the term to encompass all international agreements, the exception to the ban on discrimination virtually would engulf the general rule.

Thus we find that the Base Labor Agreement of 27 May 1968 is not a "treaty" for purposes of section 106, and the provision for preferential hiring set forth in article I of the agreement accordingly

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example: "Senate Resolution 214 makes it clear that the character of the agreements [for military bases or foreign assistance to Portugal or Bahrain] and their broad policy implications are too important to be left to unilateral action by the executive branch." S. Rep. No. 632, 92d Cong., 2d Sess. 1 (1972).

is invalidated.[36] We therefore reverse and remand to the district court for further proceedings not inconsistent with this opinion.

So ordered.

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[36] Because of this conclusion, we need not address the question of whether the provision for preferential hiring of Filipinos in the Base Labor Agreement violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2346

Filed Mar. 20, 1979

ANTHONY ROSSI, ET AL., PLAINTIFFS

v.

HAROLD BROWN, Secretary of Defense, ET AL., DEFENDANTS

MEMORANDUM AND ORDER

This matter comes before the court on cross-motions for summary judgment. The material facts are undisputed. The issue presented is readily stated: whether a Base Labor Agreement ("BLA") entered into between the United States and the Republic of the Philippines which provides for the preferential hiring of local nationals at United States military bases in the Philippines is a "treaty" within the meaning of 5 U.S.C. § 7151 note (1976), which bans discrimination against American citizens at U.S. military bases overseas "[u]nless prohibited by treaty." Restated more generally, the issue is whether the word "treaty" in 5 U.S.C. § 7151 note means a treaty in the constitutional sense—an agreement between nations approved by the Senate under its "advice and consent" powers—or in the broader international sense of any binding agreement between the governments of two nations. The court concludes that the latter interpretation is proper on the facts of this case, and will enter partial summary judgment for the defendants.

FINDINGS OF FACT

The plaintiffs are citizens of the United States who currently reside in the Philippines. The defendants, Harold Brown and W. Graham Claytor, Jr., are respectively the Secretary of Defense and the Secretary of the Navy. As of March 14, 1978, four of the plaintiffs were employed by the defendants as game room managers at Special Services, U.S. Naval Station Subic Bay, in the Republic of the Philippines. On that date they were notified that the position of game room manager would be converted to a "local national" position which could only be filled by Philippine citizens. This conversion was ordered pursuant to the Base Labor Agreement of 1968, T.I.A.S. No. 6542, Article I, which provides that:

> The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which case United States nationals may be employed.

The Base Labor Agreement has not been approved by the Senate under its "advice and consent" powers set forth in Article II, Section 2, Clause 2 of the United States Constitution. It was, however, negotiated because of an arrangement between the United States and the Republic of the Philippines providing for the establishment and maintenance of U.S. military bases in the Philippines. This negotiation took place pursuant to an Act of Congress passed in 1944, which provides in pertinent part:

> After negotiation with the President of . . . the Philippines, . . . the President of the United States is authorized by such means as he finds appropriate to withhold or to acquire and to retain such bases, necessary appurtenances to such bases, and the rights incident thereto, . . . as he may deem necessary for the mutual protection of the Philippine Islands and of the United States.

22 U.S.C. § 1392 (1976). This statutory authorization led to an initial Military Base Agreement in 1947, T.I.A.S. No. 1775, which has been the subject of periodic renegotiation, and the Base Labor Agreement of May 27, 1968, T.I.A.S. No. 6542.

Upon hearing of their proposed termination, plaintiffs Rossi, Bumgarner, Perry and Frierson instituted administrative proceedings at the Subic Bay Naval Station, contending that their proposed termination constituted unlawful discrimination on the basis of citizenship, actionable under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* (1976). They also maintained that the termination flatly violated Section 106 of Public Law 92-129, 5 U.S.C. § 7151 note (1976) [hereinafter referred to for convenience as "Section 106"] which provides in pertinent part that:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or any installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States . . . .

Local officers at the Subic Bay Station rejected the plaintiffs' complaint because they concluded that neither they nor the Department of the Navy had the authority unilaterally to modify the Base Labor Agreement. The four plaintiffs named above were subsequently fired ahead of schedule pursuant to a Reduction in Force (RIF). This early termination is the subject of a retaliation claim by the plaintiffs, which is not before the court in the present motions. The defendants correctly note that all of the plaintiffs' proposed findings of fact which relate to that termination and the retaliation claim are immaterial in the present posture of the case.

After notice of their proposed early termination, the plaintiffs brought this action on December 13, 1978, seeking a Temporary Restraining Order enjoining the defendants from firing them and barring them from the base. The court granted a temporary restraining order to permit adequate consideration of the matter, and then denied plaintiffs' Motion for a Preliminary Injunction on December 22, 1978. The court subsequently ordered cross-motions for summary judgment on the legality of Article I of the Base Labor Agreement and its status within the meaning of Section 106.

CONCLUSIONS OF LAW

I. *The Parties' contentions*

The plaintiffs' position is that Congress used the term "treaty" in Section 106 with full knowledge of its meaning and the intention that it be construed in its constitutional sense. They ask the court to examine the plain meaning of the term, recognizing that although no distinction is drawn between

"treaty" and "executive agreement" for purposes of international law, a clear distinction does exist under United States law, which the Congress must be presumed to have employed. This position, they argue, is supported by the legislative history of Section 106, by the legislative history of contemporaneous legislation which employed the term "treaty", and by interpretations of the General Accounting Office, and, until 1977, of the Department of State. The plaintiffs also contend that Congress, by enacting various laws which prohibit discrimination, has expressed its intent to prevent discrimination against American citizens at overseas military bases. Finally, plaintiffs argue that the Supremacy clause prevents the BLA from overriding conflicting Congressional enactments unless the BLA is a treaty in the constitutional sense.

The defendants maintain that although the Base Labor Agreement was never submitted to the Senate for "advice and consent" and is not a treaty in the narrow constitutional sense, it is a valid and binding international obligation of the United States, entered into pursuant to congressional authority, and thus is a "treaty" within the meaning of Section 106. They reason that the Base Labor Agreement falls within the definition of "treaty" under international law, and that other courts, particularly the Supreme Court in *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), have held agreements between the United States and another nation to be "treaties" within the meaning of certain statutes, even without the Senate's advice and consent. According to the defendants, the legislative history of Section 106 is so sparse, and the wording so awkward, that it would be a serious mistake to conclude that Congress intended to upset numerous international agreements

by a statute so hastily passed. They point to the total absence of any indication of intent to upset existing international agreements, even though numerous agreements similar to the BLA were in force between the United States and other nations at the time Section 106 was passed. Finally, the defendants stress the need for the court to employ sound principles of judicial deference when interpreting the term "treaty" in order to avoid upsetting existing relations with foreign nations and to refrain from interfering with the executive branch's conduct of foreign affairs. After an examination of the pertinent statutes involved here, and the legislative history of Section 106, the court is convinced that the defendants' position, particularly in view of the absence of a showing of persuasive legislative history, is correct.

II. *"Treaty"—Generic and Constitutional Meanings*

The broad meaning of the word "treaty", as the term is customarily used, is:

> any international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular description . . . .

Vienna Convention of the Law of Treaties of May 23, 1969, Art. 2(1)(a), *compiled at* 63 Am. J. Int'l L. 875 (1969). *See also B. Altman & Co.* v. *United States*, 224 U.S. 583, 600-01 (1912); L. Henkin, *Foreign Affairs and the Constitution* 142 (1972). Thus, the term implies a binding agreement between nations which governs some aspect of the relations between them. The parties do not dispute that the

Base Labor Agreement falls within this definition of treaty, because it was entered into in 1968 by the United States and the Republic of the Philippines after joint negotiation and drafting.

The United States Constitution suggests a narrower definition of the term "treaty".[1] Article II, Section 2, Clause 2, in delineating the powers of the President, states that:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .

Although this clause might suggest that the President cannot enter into agreements with other nations without the advice and consent of the Senate, the actual evolution of the relationship between the Executive and Legislative branches, together with a recognition of the President's powers in managing the foreign relations of the United States, have led to a recognition of the use of agreements between governments without the advice or consent of the Senate. *See generally* L. Henkin, *supra*, at 173-88.[2] It is presently beyond dispute that the President may enter into such agreements, known as executive agreements, and that such agreements are binding

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[1] "The Constitution does not define 'Treaties': the Framers, apparently, saw no need to define what was well known to international law and practice." L. Henkin, *supra*, at 140.

[2] Henkin notes that:

> The Constitution does not expressly confer authority to make international agreements other than treaties, but executive agreements, varying widely in formality and importance, have been common from our early history.

L. Henkin, *supra* at 173 (1972).

upon the United States. *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). An executive agreement, it is understood, is a "treaty" within the broad generic sense set forth above, but is not a "treaty" in the sense set forth in the Constitution.

The Base Labor Agreement is not, strictly speaking, an "executive agreement." It is what one commentator has labelled a "Congressional-Executive Agreement," L. Henkin, *supra*, at 173, because Congress "authorized the President in advance to negotiate and conclude agreements on [a] particular subject[]." *Id.*; *see* 22 U.S.C. § 1392 (1976) (President authorized to acquire and maintain bases in Philippines "by such means as he finds appropriate"). Henkin notes that the constitutional basis of such agreements is unclear, but goes on to state:

> Neither Congresses nor Presidents nor courts have been troubled by these conceptual difficulties and differences. Whatever their theoretical merits, it is now widely accepted that the Congressional-Executive agreement is a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress instead of two-thirds of the Senate only. Like a treaty, such an agreement is the law of the land, superseding inconsistent state laws as well as inconsistent provisions in earlier treaties, in other international agreements or acts of Congress.

L. Henkin, *supra*, at 175 (footnotes omitted). *Compare id.* at 176-84 (discussion of "sole" executive agreements). Of course, it still can be maintained that Congress withdrew in 1972 a portion of that

broad power which it granted to the President in the Act of 1944. Here again the question turns on the intent of Congress as gauged by an examination of the legislative history. *See* Restatement (Second) Foreign Relations Law of the United States § 145 (1965).[3]

It is in this context that the court must determine whether Section 106, which prevents discrimination against American citizens "unless prohibited by treaty" controls over and invalidates Article I of the Base Labor Agreement of 1968. If Congress intended the word "treaty" to encompass only treaties entered into with the advice and consent of the

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[3] The Restatement (Second) contains the following provision:

> § 145. Effect of Subsequent Act of Congress on International Agreement
>
> (1) An act of Congress enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supersedes it as domestic law of the United States, *if the purpose of Congress to supersede the agreement is clearly expressed.*
> (2) The superseding of the agreement as domestic law of the United States by subsequent act of Congress *does not affect the international obligation of the United States under the agreement.*

(emphasis added). Comment (b) to Section 145 states:

> [t]he courts do not favor repudiation of an earlier international agreement by implication and require clear indications that Congress, in enacting subsequent inconsistent legislation, meant to supersede the earlier agreement.

The court recognizes that the BLA has no domestic effect, so that part (1) of Section 145 is not directly applicable. The approach, however, is directly on point: the purpose of Congress must be explored to overcome a reluctance to overturn international agreements by implication.

Senate, Section 106 would control over the BLA. If Congress intended the broader term to apply, then the Base Labor Agreement provision for preferential hiring of foreign nationals is controlling.

III. *Plain Meaning and Legislative History*

The court turns, as it must, first to the words of the statute themselves and any indications of Congressional intent reflected in the legislative history of Section 106.

The plaintiffs contend that the mere use of the word "treaty" in Section 106 disposes of the matter, because the term "treaty" "is normally used to indicate an international agreement that is to be or has been brought into force with respect to the United States by and with the advice and consent of the Senate in conformity with Article II of the Constitution." Plaintiffs' Exhibit R (1975 letter of James Boyd, Acting Ass't Legal Advisor to State Department). This contention is plausible, but several factors argue against it. First, even the sources cited by the plaintiffs state that the term treaty "normally" or "most frequently" is used to refer to a treaty produced with the advice and consent of the Senate. They do not state that it invariably carries such a meaning. Second, several courts have held that executive agreements were "treaties" within the meaning of an Act of Congress. In *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), the Supreme Court held that an executive agreement between the United States and France was a "treaty" within the meaning of the Circuit Court of Appeals Act, so that a direct appeal could be had to the Supreme Court. The Court noted that the agreement was an international compact between two sovereign nations, and that

> If not technically a treaty requiring ratification, nevertheless it [the agreement] was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, ...

224 U.S. at 601. More recently, the United States Court of Appeals for the Eighth Circuit held that the Philippine Military Bases Agreement, which was drafted pursuant to the same statutory authority as the BLA, was a treaty within the meaning of a Supreme Court decision providing that the extradition of a defendant in a criminal case could only be valid if authorized "by treaty or Act of Congress." *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); *see Valentine* v. *United States*, 299 U.S. 5 (1936). Thus, the mere use of the word "treaty" is not dispositive.

This conclusion is buttressed by an examination of the context in which the word "treaty" appears. Section 106 provides that "[u]nless *prohibited* by treaty, no person shall be discriminated against . . . ." The defendants point out quite correctly that the term "prohibited" in this context is awkward, at best. It would have been more appropriate to state that "unless provided by treaty", or "unless permitted by treaty", no discrimination could occur. Whether the use of "prohibited" is an indication of sloppy draftsmanship or a more subtle intention of Congress cannot be ascertained at this point. The court does consider this confusing language significant, however, in evaluating the plaintiffs' contention that Congress chose its words carefully and meant just what it said when it used the word "treaty".

Nor does the legislative history of Section 106 support the plaintiffs' position. As the defendants correctly note, Section 106 was part of Public Law 92-129, an act which dealt extensively with military pay, the selective service, and authorization of active duty strengths for fiscal year 1972. Congress devoted extensive discussion to these topics, while paying almost no attention to what became Section 106. *See* H. Rep. No. 433, 92d Cong., 1st Sess. (1971); S. Rep. No. 93, 92d Cong., 1st Sess. (1971). The parties have not directed the court to any discussion of the import of the term "treaty", and the court has not located any on its own. Indeed, the only significant discussion of the provision indicates that Congress was more concerned with discrimination on bases in Europe which had been occurring in the absence of a Base Labor Agreement:

> The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men whose dependents are effectively prevented from obtaining employment.

H. R. Rep. No. 433, *supra*, at 31 (Conference Committee Report). *See* S. Rep. No. 93, *supra*, at 23 (similar statement). Other references to proposed section 106 merely state that it would "[p]rohibit discrimination against American citizens and their dependents in employment on overseas military bases." *Id.* at 2, 6, 41. At the time Public Law 92-129 was passed, the NATO Status of Forces Agreement contained no provision for hiring local nationals

over American citizens. Defendants' Cross Motion for Partial Summary Judgment at 11. The debates on the floor reflect a concern with matters other than discrimination pursuant to Base Labor Agreements. *E.g.*, 117 Cong. Rec. 13919 (quote similar to provision in Conference Report); 16126 (remarks of Sen. Cook) (wives of enlisted men unable to secure work permits although many foreign nationals are hired); 16128 (remarks of Sen. Schweiker) (expressing concern over command decisions to hire local nationals in Germany although not required to do so).[4]

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[4] In their supplemental memorandum, the plaintiffs maintain that "abundant" evidence indicates that Congress explicitly intended to abrogate Executive Agreements which promoted discrimination against United States citizens on overseas bases. A review of the passages from the floor debate indicates a paucity, rather than an abundance, of evidence to support the plaintiffs' position. The Senate floor debates of May 11 and May 20, 1971 contain perhaps the most significant discussions of the antidiscrimination amendment. On May 11, 1971 Sen. Schweiker began his discussion of the issue by referring to a letter drafted by Brig. Gen. Charles Phipps, which discusses the employment of U.S. tourists and dependents. The letter encourages Exchange System employers to hire local nationals, because of their lower wage costs and turnover rate. 117 Cong. Rec. 14394-95 (May 11, 1971). Senator Schweiker returned to the subject several minutes later, discussing discrimination against servicemen, but focusing on the Phipps letter. He did not mention an "agreement" for local national preference. *Id.* at 14397.

The plaintiffs nonetheless contend that the Senate, upon returning to the subject of Section 106 on May 20, 1971, explicitly discussed the BLA. *See* Plaintiffs' Supplemental Memorandum, at 3. These comments appear to refer to the plight of young wives of lower ranking servicemen who could not accompany their husbands to Europe except by coming on a tourist visa. The remarks of Senators Cook and Hughes

Thus, the court concludes that neither the plain language of Section 106 nor the legislative history of the Act supports the plaintiffs' contention that Con-

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reveal nothing about Base Labor Agreements or the meaning of "treaty" in Section 106. The excerpts cited by the plaintiffs are revealing:

> . . . it was my understanding that there was an *agreement*, through the NATO organization, *that these young wives, because they were there on tourist visas, could not get a work permit under any circumstances.*

117 Cong. Rec. 16126 (May 20, 1971) (remarks of Sen. Hughes) (emphasis added).

The next passage cited by the plaintiffs reads as follows:

> Another major point is that there should be a renegotiation of the Status of Forces Agreement (SOFA)
>
> Portions of SOFA could and should be changed to allow dependent wives to take many of the jobs now available solely to local nationals, he maintains.

Id. at 16128 (read into the record by Sen. Schweiker, quoting from an article which appeared in *Stars and Stripes*). The very next passage, which the plaintiffs neglected to quote, goes on to say:

> Mr. President, let me interject there that we have done some research and find that in Germany particularly, that is not the case. Our commanding general who is head of the European Exchange System, Gen. Charles H. Phipps, in a memo of February 1971, issued this edict across Europe to all the stores and services in the exchange system:
>
> [quoting Phipps letter] For the reasons outlined above, I desire that the European Exchange System elements in the months ahead emphasize recruitment of local nationals and sharply deemphasize the utilization of United States dependents or tourists.
>
> [by Sen. Schweiker] Here is an American general saying that when the GI's go to their canteen or service post exchange and spend their money, they do not even

gress intended to ban all discrimination on military bases abroad, even when pursuant to an agreement between nations. In fact, the legislative history would argue against such an interpretation.

The plaintiffs nonetheless argue that the "legislative context" of Public Law 92-129 supports their position, because other laws enacted by Congress during the same time period make a clear distinction between "treaty" in the narrow constitutional sense and the broader definition. Thus, the 92d Congress also enacted the Case Act, 1 U.S.C. § 112b, which requires the executive to transmit to Congress" the text of any international agreement, *other than a treaty*, to which the United States is a party. . . ." *See also* S. Rep. No. 632, 92d Cong., 2d Sess. (1972) (Committee Report for S. Res. 214, stating that agreements with Portugal or Bahrain for military bases should be submitted as treaty for advice and consent, rather than as executive agreement). These enactments do reflect a concern in Congress that the President was conducting foreign policy without adequately consulting the Senate. They do not, however,

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have the right to have their wives working there because we should give those jobs to local nationals.

117 Cong. Rec. 16128 (May 20, 1971) (emphasis added)

The remaining comments cited by the plaintiffs are mere precatory language about discrimination.

Finally, the defendants correctly state that Mr. Schweiker, in continuing his discussion, reviewed the plight of lower level servicemen in Europe and stated that "[j]ust a simple Executive order would change this." 117 Cong. Rec. 16132 (May 20, 1971).

Thus, contrary to the plaintiffs' assertions, the legislative history of Section 106 is far from clear, and it can in fact be credibly argued that Congress had in mind only those instances of discrimination which resulted from the caprice of individual officers.

support the plaintiffs' contention that Section 106 of Public Law 92-129 must be read *in pari materia* with contemporaneous legislation.

First, the cases relied upon by the plaintiff involved closer similarities in language than the use of a single word. *See, e.g., United States* v. *Stewart*, 311 U.S. 60, 64 (1940) (two acts passed at different times dealt "with precisely the same subject matter . . . the scope of the tax exemption afforded farm loan bonds"). In *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-44 (1972), the Supreme Court stated that

> The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a 'later act can . . . be regarded as a legislative interpretation of [an] earlier act. . . .' "

The present case deals with two statutes which do not deal with the same subject matter. Both the Case Act and the debate over Senate Resolution 214, it is true, dealt with Congressional concern over the Executive Branch's increasing use of executive agreements rather than submitting international agreements to the Senate. Section 106, however, insofar as the court can determine from the legislative history, dealt with discrimination against the families of American servicemen, particularly in Europe. If the Congress was attempting to make Section 106 another front in the war against executive agreements, as plaintiffs suggest, there should have been at least *some* indication of that intent in the legislative history. The court therefore rejects the plain-

tiffs' suggestion that the word "treaty" be interpreted in the constitutional sense just because it was so employed in roughly contemporaneous legislation.

IV. *Judicial Deference in the Area of Foreign Affairs*

The court notes that at the time Section 106 was passed, twelve international agreements were in effect which contained provisions for hiring preference for local nationals at overseas military bases. None of these agreements had been submitted for the advice and consent of the Senate. Defendants' Cross-Motion for Partial Summary Judgment at 12 n. 11. Two additional agreements have been added since 1971 with local national preference provisions. It is beyond dispute that these agreements were entered into after negotiations, with the understanding that the hiring of local nationals when possible would be part of the *quid pro quo* for the retention by the United States of military bases in the host country. The interpretation of Section 106 urged by the plaintiffs would invalidate the preferential hiring provisions of these treaties, with uncertain effects in the conduct of foreign affairs.[6] The existence of these agreements, and their scope, counsels the court in two

[6] It is true that the only BLA actually before the court concerns the Republic of the Philippines, and that the court can make no factual findings regarding the extent of local national hiring or foreign policy implications of similar agreements with other nations. Nonetheless, if the court affirmed the plaintiffs' position and was upheld on appeal, the court's construction of Section 106 would perforce have an impact on other agreements. Counsel for the plaintiffs acknowledged this impact at the hearing in this matter, agreeing that a decision by this court would constitute "persuasive" authority for similar challenges.

ways. First, it suggests that the court should not lightly infer a Congressional intent to overturn portions of fourteen international agreements in the absence of *any* legislative history suggesting such an intent. Second, it persuades the court to act cautiously in an area fraught with sensitivity and affecting foreign affairs of the United States.

The court does not agree with the suggestion put forth by the defendants, however, that this controversy is nonjusticiable. Defendants' Cross-Motion for Summary Judgment at 13-14, *citing Diggs* v. *Richardson*, 555 F.2d 848 (D.C. Cir. 1976); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). This case does not require the court to interpret the terms of a treaty or to meddle in areas of foreign import which have been traditionally regarded as the province of the President. It involves the construction of an Act of Congress, a task which necessitates an evaluation of the wording of the statute, the legislative history, and the applicable case law and canons of construction. The impact on foreign affairs of such construction does not render the case nonjusticiable. It does, however, persuade the court that the construction urged by the plaintiffs would have to be supported by a far firmer basis than that existing here.

V. *Applicability of Title VII to this Action*

The court concludes that the term "treaty" in Section 106 should be construed to mean a treaty as the term is defined under international law—an agreement between nations. This being the case, the Base Labor Agreement is a valid exercise of the President's authority to retain bases "by such means as he finds appropriate." 22 U.S.C. § 1392 (1976). The

specific provision that the Department of Defense may discriminate on the basis of citizenship if provided by treaty therefore controls over the general provisions of Title VII. *Randzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974). The court need not address the question whether Title VII applies to citizenship as well as to national origin.

The court's holding regarding Title VII does not, however, apply to those portions of the plaintiffs' case based upon allegations of retaliation. The retaliation issues are not before the court at this time, and no statute provides that retaliation may be engaged in. It appears to the court, however, that the reprisal charges might not be ripe for review. The reprisal complaint challenging the plaintiffs' early termination was filed on November 15, 1978. The court is entirely willing to adjudicate this issue, but it must be satisfied that the strict "jurisdictional prerequisites", which give the court subject matter jurisdiction, have been met. *See* 42 U.S.C. § 2000e-16(c) (1976) (civil action may be filed after 180 days have expired without agency action on administrative complaint); *Richardson* v. *Wiley*, 569 F.2d 140, 142 (D.C. Cir. 1977) (Title VII time limitations are jurisdictional). Therefore, the court will order the parties to appear at a status call ten days from the date of this order to clarify the status of plaintiffs' retaliation claim.

CONCLUSION

The court holds that on the facts of this case, the term "treaty" in Section 106 of Public Law 92-129, 5 U.S.C. § 7151 note (1976), means any agreement between nations. The court also holds that Title VII

of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* is therefore inapplicable to this action. Partial summary judgment on these issues will be entered for the defendants. The plaintiffs' remaining discovery motions, having been rendered nugatory by the above holdings, will be denied.

/s/ Thomas A. Flannery
United States District Judge

Dated: 3-20-79

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2346

ANTHONY ROSSI, ET AL., PLAINTIFFS

v.

HAROLD BROWN, Secretary of Defense, ET AL., DEFENDANTS

Filed Mar. 20, 1979

ORDER

This matter came before the court on cross-motions for partial summary judgment. Upon consideration of the motions, the record in this case, the hearing held before the court, and the applicable law, it is, by the court, in accordance with the foregoing Memorandum, this 20th day of March, 1979,

ORDERED that the plaintiffs' motion for partial summary judgment shall be, and the same hereby is, denied; and it is further

ORDERED that the defendants' motion for partial summary judgment shall be, and the same hereby is, granted; and it is further

ORDERED that plaintiffs' motions for the issuance of letters rogatory and to compel the depositions of certain Department of State officials shall be, and the same hereby are, denied; and it is further

ORDERED that the parties appear before the court for a status call on April 3, 1979 at 9:30 a.m. to apprise the court of the present status of the plaintiffs' retaliation claim and to determine what further action should be taken in this case.

/s/ Thomas A. Flannery
United States District Judge

[SEAL]

APPENDIX C

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
Washington, D.C. 20350

26 May 1978

From: Director of Equal Employment Opportunity

To: Mr. Anthony M. Rossi, Recreation Aid, PSO139-2, Special Services Department, U.S. Naval Station, Subic Bay

Subj: Notice of decision to reject class complaint of discrimination

Ref: (a) FEAA ltr of 4 May 78, subj: Class Complaint/Mr. Anthony Rossi

(b) FPM Supplement 990-1, Part 713

1. Your class complaint of discrimination based on national origin, including the findings and recommendations of the Complaints Examiner (reference (a)) has been carefully reviewed in accordance with the provisions of reference (b). Reference (b) provides that the Complaints Examiner's recommendation to accept, reject, or modify a complaint shall become the agency decision unless the agency rejects or modifies the decision within 10 calendar days of its rejection. In this regard, it should be noted that although the Complaints Examiner's recommendation to the agency, reference (a) is dated 4 May 1978 it was received by this office on 16 May 1978.

2. In accordance with references (a) and (b), the Department of the Navy accepts the recommendation of the Complaints Examiner that your class complaint be rejected. Your class complaint is hereby rejected

for the reasons recommended by the Complaints Examiner (listed in the subparagraphs below) and for the additional reasons listed in paragraphs 3 and 4 of this letter. Specifically, the Department concurs with the Complaints Examiner in the following:

a. *Timeliness.* The complainant did not actually suffer an individual injury within the 90 day period prior to 29 March 1978. Therefore the complaint does not meet the criteria for acceptance set forth in 5 CFR 713.602(a) (reference (b)).

b. *Class.* The complainant's class based on common citizenship does not meet the definition of a class set forth in 5 CFR 713.601(a) (reference (b)) for the reasons stated in the Complaints Examiner's reasons set forth in reference (a).

c. *Claims of the Agent and Class.* The complaint fails to demonstrate any typicality in the claims of those members of the ostensible class, who wish to be employed, with the claims of yourself, the agent, an employee of the Navy. Therefore, the complaint does not meet the criteria set forth in 5 CFR 713.601(b)(iii) (reference (b))for a class complaint.

3. In addition to the foregoing, 5 CFR 713.601(a) provides that a class may be established only if a complaint of discrimination alleged that the class members:

> have been, are being, or may be adversely affected, by an agency personnel management policy or practice which the agency has authority to rescind or modify . . . .

The alleged discriminatory practice of giving preferential treatment in employment to Filipino citizens over United States nationals is required by Article I, paragraph 1, of the Base Labor Agreement of 27

May 1968 (BLA) between the Governments of the United States and the Republic of the Philippines. The BLA is a legally binding obligation of the United States Government which can not be unilaterally modified. Article VI, paragraph 3, of the BLA specifically provides that:

> Either Government may at any time request the revision of any provision of this Agreement, in which case the two Governments shall enter into negotiations through diplomatic channels.

Thus, it is clear that the Government of the Philippines would have to agree to a revision of Article I, paragraph 1, of the BLA. Accordingly, it is concluded that the matters complained of in the instant class complaint are not under the control of the Department of the Navy and the Department does not possess the authority to rescind or modify the alleged discriminatory practices complained of in the complaint. Therefore, a class may not be maintained in this matter under 5 CFR 713.601(a).

4. Finally, the complaint here in issue is based, at least in part, on allegations the employment practices of the Department of the Navy violated section 106 of Public Law 92-129 (the Act of September 28, 1971, 85 Stat. 348, 355). Inasmuch as the class complaint regulations of the Civil Service Commission provide only for redress of alleged violations of the Civil Rights Action of 1964, as amended, those portions of the class complaint based upon alleged violations of section 106 of Public Law 92-129 are found to be not within the purview of the class complaint regulations and are rejected.

5. This is the final decision of the Department of the Navy on this matter. If you are dissatisfied

with the decision, you have the following appeal rights.

a. An Agent may appeal to the Appeals Review Board (ARB) the decision of the Head of the Agency or his/her designee to reject or cancel his/her complaint, or a portion thereof, for reasons covered by 5 CFR 713.604. An appeal may be filed at any time after receipt of the Agency's final decision, but not later than 15 calendar days after receipt of that decision except when the appellant shows that he/she or his/her representative was not notified of the prescribed time limit and was not otherwise aware of it, or that he/she or his/her representative was prevented by circumstances beyond his/her control from appealing within the prescribed time limit. An appeal shall be deemed filed on the date it is postmarked, or in the absence of a postmark, on the date it is received by the ARB. An appeal to the ARB should be addressed to the U. S. Civil Service Commission Appeals Review Board, 1900 E Street, N.W., Washington, D. C. 20415.

b. The Agent has the right to proceed with his/her individual complaint of discrimination, and to appeal the final agency decision on the matter to the Appeals Review Board (ARB) and to file a civil action.

c. An Agent who has filed a discrimination complaint based on race, color, religion, sex and/or national origin is authorized to file a civil action in an appropriate U.S. District Court, (1) within 30 calendar days of his/her receipt of notice of final action taken by his/her agency on a complaint; (2) after 180 calendar days from the date he/she filed a complaint with his/her agency if there has been no decision on the complaint; (3) within 30 calendar days

of his/her receipt of the decision of the ARB on his/her appeal; or (4) after 180 calendar days from the date he/she filed an appeal with the ARB, if there has been no ARB decision.

/s/ W. M. Paz
W. M. PAZ

Copy to:

OGC (09A)
JAG (104)
OCP (113)
COMNAVBASE Subic

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1485

September Term, 1979

Civil No. 78-2346

ANTHONY M. ROSSI, ET AL., APPELLANTS

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: McGOWAN and WILKEY, Circuit Judges, and DAVIES*, Senior United States District Judge for the District of North Dakota

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

the case is remanded for further proceedings, not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 15, 1980

Opinion for the Court filed by Circuit Judge Wilkey

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1485

September Term, 1980

Civil Action 78-2346

ANTHONY M. ROSSI, ET AL., APPELLANTS

v.

HAROLD BROWN, AS SECRETARY OF DEFENSE, ET AL.

Before: McGowan and Wilkey, Circuit Judges; Davies*, U.S. Senior District Judge for North Dakota

ORDER

On consideration of appellees' petition for rehearing, it is

ORDERED, by the Court, that appellees' aforesaid petition is denied.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Filed Dec. 18, 1980

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* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1485

September Term, 1980
Civil Action 78-2346

ANTHONY ROSSI, ET AL., APPELLANTS

v.

HAROLD BROWN, as Secretary of Defense, ET AL.

Before: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges and Davies *, U.S. Senior District Judge for North Dakota

ORDER

The suggestion for rehearing *en banc* filed by appellees having been transmitted to the full Court and no judge in regular active service, and no member of the panel which considered this case, having requested a vote with respect thereto, it is

ORDERED, by the Court *en banc*, that appellees' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Filed Dec. 18, 1980

* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

APPENDIX G

PHILIPPINES

Military Bases in the Philippines: Employment of Philippine Nationals

Agreement signed at Manila May 27, 1968;
Entered into force May 27, 1968.
With agreed minutes.

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES RELATING TO THE EMPLOYMENT OF PHILIPPINE NATIONALS IN THE UNITED STATES MILITARY BASES IN THE PHILIPPINES

The Government of the United States of America and the Government of the Republic of the Philippines:

Having agreed in the Military Bases Agreement of 1947,[1] as amended, to establish United States military bases in the Philippines to serve the common defense of the two countries;

Noting the absence in that Agreement of provisions concerning labor relations and terms and conditions of employment of Filipino citizens employed by United States Armed Forces in the Philippines;

Recognizing the need to promote and maintain sound employment practices which will assure equal-

---

[1] TIAS 1775, 6084; 61 Stat. (pt. 4) 4019; 17 UST 1212.

ity of treatment of all employees and their right to self-organization and collective bargaining; the orderly administration and effective operation of the bases; and continuing favorable employer-employee relations thereon; and

Believing that an agreement will be mutually beneficial and will strengthen the democratic institutions cherished by both Governments;

Have agreed as follows:

ARTICLE I

EMPLOYMENT STANDARDS

1. *Preferential Employment.*—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed. Exception is permitted, however, in the case of third country nationals already employed on the date of entry into force of this Agreement and in the case of technical personnel of third country nationality as envisaged in paragraphs 1 and 2, Article XI of the Military Bases Agreement of 1947, as amended.

2. *Uniform Standards.*—To the extent consistent with the provisions of this Agreement and the national laws of either country and regulations pursuant thereto and in conformity therewith, terms and standards of employment, including wages, working conditions and benefits shall be subject to collective bargaining and, under uniform personnel policies and

administration, shall apply equally to all employees, regardless of nationality and sources of funds used.

3. *Overtime Compensation.*—Work performed in excess of the regular workday and workweek shall be considered overtime to be paid the corresponding overtime compensation.

4. *Manpower Allocation.*—In the event the Philippine Government adopts measures allocating manpower, the two Governments shall work out in the Joint Committee established under Article III measures ensuring fulfilling of the labor needs of the United States Armed Forces.

5. *Social Security Benefits.*—The United States Armed Forces in the bases shall implement, as of July 1, 1968, a health insurance program and shall consider the adoption of additional social security benefits to Filipino employees consistent with prevailing industry practices in the Philippines.

6. *Security of Employment.*—Consistent with their military requirements, the United States Armed Forces shall endeavor to provide security of employment and, in the event certain activities or services are contracted out, the United States Armed Forces shall require the contractor or concessionaire to give priority consideration to affected employees for employment. The United States Armed Forces shall at the same time give to such employees priority consideration for reemployment by the base. If reemployed by the base, such employment shall be without loss of seniority.

7. *Severance Pay.*—Except when separation is for cause, severance pay benefits shall be granted to those employees whose employment is terminated involuntarily, including termination by reduction in force caused by disestablishment or deactivation of a func-

tion, activity or command. For purposes of computing severance pay, the basis shall be the employee's total or aggregate service, less periods of service for which he had already been paid severance pay.

ARTICLE II

RIGHT TO SELF-ORGANIZATION AND COLLECTIVE BARGAINING

1. Filipino employees of the United States Armed Forces in the Philippines shall have the right to self-organization and to collective bargaining in accordance with the provisions of this Agreement. The right to self-organization shall include the right to join or refrain from joining a union or labor organization without interference, coercion, restraint, discrimination or reprisal.

2. Any federated labor organization or individual labor organization duly registered in accordance with Philippine laws and representing the majority of the Philippine employees of the United States military bases in the Philippines shall be entitled to recognition by the United States Armed Forces and shall enjoy exclusive bargaining representation for such employees. The United States Armed Forces will make provision for voluntary checkoff of labor organization dues. In the event a labor organization does not represent a majority of such employees, any duly registered labor organization representing a majority of the employees at a base or group of bases shall be entitled to recognition and enjoy exclusive bargaining representation for such base or group of bases. Nevertheless, any employee shall have the right to present a grievance directly or through a representative under established grievance or labor relations proce-

dures. Questions concerning recognition may be referred to the Joint Committee provided for in Article III of this Agreement.

3. In view of the common security interests of the two Governments as recognized in the Military Bases Agreement of 1947, as amended, the Joint Committee described in Article III, below, at the request of either party to a dispute which threatens the orderly and effective operation of the bases, shall direct measures to promote resolution of that dispute. Any action taken by a recognized labor organization which interrupts or disrupts the orderly and effective operation of the bases before the Joint Committee has taken its final action in such a case may be considered just cause for withdrawal or recognition of that organization. Disciplinary action may be taken against any individual employee or group of employees participating in such action, subject to review, however, by the Joint Committee, which shall proceed in accordance with Article III hereof.

4. The Joint Committee shall not be deemed to have taken final action until the dispute has been resolved between the parties under the procedures provided in Article III of this Agreement. During this period, the parties to the dispute shall observe utmost good faith in collective bargaining and in negotiating their differences without resorting to acts inimical to their mutual interests.

ARTICLE III

JOINT COMMITTEE

1. Any dispute between the United States Armed Forces and Filipino employees or duly recognized union or organization of employees which cannot be

settled through grievance or labor relations procedures provided for in Article II of this Agreement may be referred by either party to the dispute to a Joint Committee which shall be composed of not more than three representatives appointed by each Government and shall include labor relations specialists.

2. The Committee shall determine its own procedures and, whenever a dispute has been referred to it, shall:

(a) Devise means by which the parties themselves can settle their dispute rather than render final decisions; and

(b) Satisfy itself that every effort has been fully exerted by the parties to settle the dispute through the grievance or labor relations procedures referred to above. Otherwise, it may refer the dispute back to the parties, indicating what further steps may be taken to reach a settlement.

3. In the event the dispute remains unresolved, and either party resubmits it to the Joint Committee, the latter may refer the matter back to the parties requiring either mediation, conciliation or fact-finding or recommending any other measure.

4. The Governments of the United States and of the Philippines, through their respective authorized agencies or representatives shall, upon request, make available to the Joint Committee or any mediator, conciliator or fact-finder indicated in the preceding paragraph, all pertinent materials, data or information, except those which are classified for security reasons.

5. The Joint Committee, referred to above, shall likewise serve as a channel for continuing consulta-

tion betwen the two Governments and as the principal channel for the implementation of this Agreement.

ARTICLE IV

GENERAL PROVISIONS

1. Contractors and concessionaires performing work for the United States Armed Forces in the Philippines shall be required by their contracts or concessions agreements to comply with all applicable Philippine labor laws and regulations. For the effective enforcement of these labor laws and regulations, base authorities shall facilitate access by appropriate Philippine government officials to sites where such contractors work, upon prior request and proper identification.

2. Nothing in this Agreement shall imply any waiver by either of the two Governments of its immunities under international law.

ARTICLE V

MID-YEAR ANNUAL BONUS

In view of the concerns of both Governments for the general welfare of the employees of the United States Armed Forces in the Philippines and in response to a request from the Philippine Government, the United States Armed Forces will, as an incentive to such employees, pay each Philippine national employed by them for one year or more on July 1, 1968, a mid-year bonus of two hundred pesos and to those employed on July 1 of each subsequent year the same amount. Those employed for less than one year on the date of payment will be paid a pro-rata

share of two hundred pesos for each full month of employment.

ARTICLE VI

ENTRY INTO FORCE

1. This Agreement shall enter into force upon signature by the two Governments except with respect to any provision which requires further administrative action for its execution. Any such provision shall enter into force as soon as the requisite administrative action has been taken but in no case later than six months from the date of signature by the two Governments.

2. Employment policies, practices and benefits existing at the time this Agreement enters into force shall continue unless modified by collective bargaining in accordance with this Agreement or by subsequent agreement between the two Governments.

3. Either Government may at any time request the revision of any provision of this Agreement, in which case the two Governments shall enter into negotiations through diplomatic channels.

4. This Agreement, and agreed revisions thereof, shall remain in force for the duration of the Military Bases Agreement of 1947, as amended, unless terminated earlier by agreement between the two Governments.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement, incorporating the attached Agreed Minutes.

DONE at Manila, in duplicate, this 27th day of May, 1968.

For the Government of the United States of America:

/s/ James M. Wilson Jr.
JAMES M. WILSON JR.
Charge d'Affairs, Mi.

Members of the United States Panel

/s/ Hugh G. Appling
HUGH G. APPLING
Chairman

/s/ William Paz
WILLIAM PAZ

/s/ Robert M. Fisk
ROBERT M. FISK

For the Government of the Republic of the Philippines:

/s/ Blas F. Ople
BLAS F. OPLE
Secretary of Labor

Members of the Philippine Panel

/s/ R. M. Inocentes
R. M. INOCENTES
Chairman

/s/ Gauttier F. Bisnar
GAUTTIER F. BISNAR
Vice Chairman

/s/ Ruben F. Santos
RUBEN F. SANTOS

/s/ Apolonio V. Castillo
APOLONIO V. CASTILLO

/s/ Paciano C. Villavieja
PACIANO C. VILLAVIEJA

/s/ F. A. Fuentes
F. A. FUENTES

/s/ Cristela A. Feria
CRISTELA A. FERIA

/s/ S. Tomas de la Cruz
S. TOMAS DE LA CRUZ

AGREED MINUTES TO AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES RELATING TO THE EMPLOYMENT OF PHILIPPINE NATIONALS IN THE UNITED STATES MILITARY BASES IN THE PHILIPPINES

1. *Article I, Paragraph 1.* The term "special management needs" applies to situations, not all definable in advance, in which the employer, exceptionally, needs, for example:

(a) an employee who is known to be not subject to any personal bias or pressures, for instance in some personnel management functions;

(b) an employee who, perhaps for reasons of long association or experience with a given problem, has the employer's special confidence and who will be known to represent him personally; (c) employees whose work requires them to know and serve American culture and customs; an example might be in some aspects of education of American children.

2. *Article I, Paragraph 2.* The Philippine representatives expressed the hope, noted by the United States representatives, that future steps toward uniformity in the terms of employment of all base employees will be considered. The United States representatives stated, and the Philippine representatives noted, that existing United States laws and regulations now establish terms of employment for all employees, both United States and local nationals, and as to the latter require that their conditions of employment as they relate to wages and compensation shall be based upon prevailing standards and practices of representative progressive employers in the locality which shall be determined by means of periodic technical surveys to be conducted by the United States Armed Forces. The employees, through their recognized labor organizations, shall participate in determining the frequency of and in developing the principles and procedures for such technical surveys, and shall be duly informed of survey results. These principles and procedures shall include the selection of employing firms and comparable positions to be included in the surveys.

3. *Article I, Paragraph 3.* The term "regular workday" shall be understood to mean a workday not in excess of the maximum number of hours allowed without additional compensation under Philippine laws and regulations.

4. *Article I, Paragraph 6.* The United States Armed Forces shall not have responsibility for the enforcement of this provision or the hearing of possible disputes between affected employees and the contractor or concessionaire under this provision.

5. *Article I, Paragraph 7.* The United States Armed Forces may separate an employee at such time as the continuation of his employment is inconsistent with their military requirements, in which case the employee shall be entitled to severance pay unless separation is for cause in accordance with established procedures.

6. *Article II, Paragraph 2.* Should more than one labor organization be recognized as bargaining representative for all the United States military bases such labor organizations shall, in order to facilitate implementation of this Agreement, particularly the uniform and equal application of terms and conditions of employment and personnel policies and administration, undertake joint collective bargaining with the United States Armed Forces. However, collective bargaining on questions unique to one base by the labor organization representing the majority of the employees in such base is not precluded.

7. *Article II, Paragraph 3.* The term "disciplinary action" does not exclude the suspension or discharge of an employee.

8. *Article IV, Paragraph 1.* It shall be the responsibility of Philippine authorities to determine whether contractors and concessionaires performing work for the United States Armed Forces in the Philippines comply with Philippine labor laws and regulations and to enforce compliance with such laws and regulations.

The United States Armed Forces will submit to the Philippine Government periodically a list of all contractors and concessionaires in the bases.

9. *Article VI, Paragraph 1.* The representatives of both Governments stated their intention to take the necessary administrative steps to implement the Agreement at once, in any case not later than six months from the date of signature of the Agreement, and insofar as possible to have effect not later than July 1, 1968.

10. *Article VI, Paragraph 2.* The United States Armed Forces are not precluded from introducing unilaterally future measures to enhance existing working conditions and benefits to employees.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 344314 307

Office-Supreme Court, U.S.
FILED
JUN 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1924

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL., RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Constitution, treaties, statutes and executive agreements:

Pub. L. No. 92-129, Section 106, 85 Stat. 355, codified at 5 U.S.C. 7151 note 2

Miscellaneous:

5 C.F.R. §8 (1980) 6
5 C.F.R. §301 (1980) 6
117 Cong. Rec. (1971):
p. 16,126 5
p. 16,132 5
H.R.Rep. No. 433, 92d Cong., 1st Sess. (1971) 4
Manila Times Journal (Aug. 14, 1976) 7
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In the Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1924

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET. AL., PETITIONERS,

v.

ANTHONY M. ROSSI, ET. AL., RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTRODUCTORY STATEMENT

Counsel, on behalf of respondents Anthony M. Rossi, *et al.*, oppose the granting of a writ of certiorari in this case for the reasons set out below.

Respondents generally concur with the facts as presented in the statement of the case by the Petitioner (hereinafter "the Government"). This brief in opposition will not attempt to summarize the arguments made before the Court of Appeals nor the decision by the court below. However, respondents will seek to narrowly reply to a few key points raised by the petition of the Government which respondents respectfully hope will aid this Court in acting on said petition.

REASONS FOR DENYING THE PETITION

Despite a unanimous Court of Appeals decision and not a single vote for rehearing,[1] the Petitioner continues to advance a contorted view of the Hughes-Schweiker Amendment,[2] (hereinafter "the Amendment") which would totally frustrate the intent of Congress. The legislative history directly indicates that the Amendment was intended to provide "that the Department of Defense cannot discriminate against American citizens or their dependents in employment on military bases."[3] The only substantial argument raised by the Government's petition alleges adverse foreign policy implications from the Court of Appeals decision,[4] an argument which is legally irrelevant and factually unsupported. The thrust of the Government's argument in this regard is more properly addressed to Congress rather than this Court.[5] For these reasons more fully articulated below, the petition should be denied.

At this juncture, this case involves solely a matter of statutory construction. The Court of Appeals was fully briefed by the parties on all issues raised in the

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[1] Petitioners' Appendix at 49a.

[2] Act of September 28, 1971, Pub. L. No. 92-129, §106, 85 Stat. 348, 355 (codified at 5 U.S.C. §7151 note (1976)). The provision was sponsored by Senators Hughes and Schweiker as an amendment to the Selective Service Act Amendments of 1971.

[3] S. Rep. No. 92-93, 92d Cong., 1st Sess. 23 (1971).

[4] Petition at 20-22

[5] *See infra* at 6-8.

petition before this Court and unanimously rejected the interpretation advanced here by the Government. Since all preferential hiring of local nationals at the time Congress considered the Amendment was done under executive agreements, the Court of Appeals concluded:

> [I]f we were otherwise to construe the term [treaty] to encompass all international agreements, the exception to the ban on discrimination virtually would engulf the general rule.[6]

Under the novel construction argued here by the Government, it is virtually impossible to envision the goals Congress intended to serve by passing the Amendment.[7]

The legislative history of the Hughes-Schweiker Amendment was discussed in the Court of Appeals decision[8] and need not be reiterated here. The conference committee report referred to the provision, originated as a Senate floor amendment by Senators Hughes and Schweiker, as "prohibiting job discrimination against American citizens and their dependents in hiring in United States military bases in

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[6] Court of Appeals decision at 17, Petitioners' Appendix 18a.

[7] One has difficulty determining what evil Congress was addressing if not executive agreement-foisted preferential hiring. The Government earlier advanced the argument that the provision was directed solely against the unilateral actions of local commanders, a view guardedly endorsed by the District Court (467 F. Supp. 960, 967, n.4) and rejected by the Court of Appeals (Petitioners' Appendix 15a).

[8] Court of Appeals decision at 9-17, Petitioners' Appendix 9a-18a.

any foreign country."[9] If there is any canon of construction which is entitled to special weight by the courts, it is the principle that statutes ought to be construed to achieve the purpose Congress intended.[10] Extension of the term "treaty" in the Hughes-Schweiker Amendment to encompass executive agreements *would exempt every preferential hiring arrangement in existence at the time of passage of the bill.*[11] Such a result made no sense to the Court of Appeals and should not be seriously entertained by this Court.

The legislative history specifically refers to the problem of preferential hiring done by international agreements and these references, when added to the obvious purpose of the bill, are compelling support for the Court of Appeals decision.[12] The most notable statement was made by Senator Hughes:

> Those in the lowest ranks cannot have their wives obtain anything but a tourist visa. They are disqualified from helping themselves. And

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[9] H.R. Rep. No. 433, 92d Cong., 1st Sess. 31 (1971).

[10] *Potomac Electric Power Co. v. Department of Labor,* 49 U.S.L.W. 4063 (1980); *Philbrook v. Glodgett,* 421 U.S. 707 (1975).

[11] *See* Court of Appeals decision at 13, Petitioners' Appendix 13a.

[12] Respondents will not repeat the several references in floor debates, which were detailed in their appellate brief at 19-23 and are discussed in the Court of Appeals decision. Petitioners' Appendix 14a. Statements of legislative sponsors have been recognized by this Court as entitled to great weight in ascertaining intent. *See e.g. NLRB* v. *Fruit & Vegetable Packers & Warehousemen Local 760,* 377 U.S. 58, 66 (1964).

> they are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located,* and are forced to live in poverty.[13]

Elsewhere Senator Schweiker read into the record during the same floor debates a statement referring to base jobs as being "*classified as local national jobs and American dependents cannot fill the jobs because of their classification.*"[14] Indeed, all the preferential hiring then occurring was due to executive agreements, such as the Base Labor Agreement of 1968 (hereinafter "BLA"), which so classified the jobs.[15]

Against this very cogent and clear legislative history,[16] the Government's petition only confuses the issue. The petition first suggests that Senator Hughes' reference to agreements was to "visa status of American military dependents,"[17] but then concludes:

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[13] 117 Cong. Rec. 16,126 (1971), cited in Court of Appeals decision, Petitioners' Appendix 14a. (Emphasis added)

[14] 117 Cong. Rec. 16,132 (1971), cited in Court of Appeals decision, footnote no. 29., (Petitioners' Appendix 14a-15a) (Emphasis added).

[15] *See* Article I, Section 1, Petitioners' Appendix 51a.

[16] The presence of lengthy passages in the legislative history dealing with other issues (Petition at 15) is, of course, irrelevant. *Cf. New York* v. *Train,* 161 U.S. App. D.C. 114, 494 F.2d 1033, 1039 (1974), *aff'd* 420 U.S. 35 (1975) (relying on several passages by the bill sponsors in a 1700 page legislative history).

[17] Petition at 16.

> Senator Hughes' statement thus is irrelevant to the problem addressed by Section 106 and sheds no light on the proper interpretation of the word 'treaty.'[18]

This position is based upon a serious misconception: work permit visas from host governments for Americans are *not* required for jobs on American bases overseas.[19] The Senators were referring to the visa problem only to demonstrate that the dependents could not get jobs in the *local economy,* a fact which added to their plight. Moreover, the classification of the jobs as "local national" positions was also specifically raised in the same floor debates.[20]

The final position asserted by the Government's petition is that the decision below "will hamper the United States' ability to negotiate for and maintain base rights and other military advantages in the Philippines and elsewhere."[21] Respondents believe that this assertion is wholly inaccurate and, even if it were not, should be viewed by this Court as legally irrelevant. The Government is free to submit any new or existing arrangement to the Senate for

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[18] *Id.* at 17.

[19] Jobs in U.S. installations overseas are U.S. Civil Service jobs, not jobs in the local economy. *Cf.* 5 C.F.R. Parts 8 and 301 (1980). A request by counsel to the Department of Defense for all DOD instructions on "employment of military and civilian personnel stationed in foreign areas" for the period 1961-74 yielded no documents referring to any work permit requirements for jobs at these U.S. bases. (This Court can take judicial notice of the content of DOD circulars and instructions. *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947)).

[20] *See* note 14, *supra.*

[21] Petition at 21.

ratification as a "treaty."[22] If the status of bases were really involved, this would be the prudent and proper course of action—not appeals to this Court which rely solely on newspaper editorials for support.[23]

There is compelling evidence that the preferential hiring arrangements in the Philippines were contemplated for submission to the Senate in the last series of negotiations.[24] Concern of several Senators for the impact of this practice on dependents was met by the Government's recitation of anticipated treaty ratification of the hiring arrangements in the Philippines.[25] For the Government to now raise in

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[22] Indeed, since this case arose, the Government has already reneged on representations to Congress that the BLA preferential hiring provisions would be submitted as a treaty for ratification by the Senate. *See* note 25, *infra*.

[23] Petition at 21. On August 14, 1976, the *Manila Times Journal* carried a story about the Filipino Civilian Employees Association calling for the "abrogation of the labor agreement." Obviously, it is difficult to make law out of the newspapers.

[24] The Department of Defense told a House Appropriations subcommittee in 1977 that a "new agreement, when finalized, will be submitted to the Senate for ratification." (Attached hereto as Appendix A).

[25] *See* Attachments Two through Five to Plaintiffs' Opposition to Defendants' Cross-motion for Summary Judgment, filed February 26, 1979. Senator Morgan, for instance, was advised that "[t]he finalized treaty, which will require ratification by the Senate, should resolve the question as to whether preferential employment of Filipinos is to continue." Letter from E.B. Riley, Acting Director of Personnel Management Division, Department of Defense, dated July 15, 1977. (Attached hereto as Appendix B).

this Court the policy arguments it should have presented to the Senate is highly inappropriate.[26]

Finally, it should be stressed that the sort of vague assertion of foreign policy and national security implications made by the Government is legally irrelevant.[27] The Government itself in the District Court noted that "it would be improper for this court to serve as a forum for foreign policy debate."[28] There are obviously mechanisms, besides granting certiorari, for taking into account the legitimate foreign policy effects of the decision below.[29] This Court is plainly the wrong forum for such assertions.

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[26] The Government is always free to submit the BLA or any other agreement to the Senate. Its failure to do so should silence its representations that important foreign policy considerations exist.

[27] *Cf. United States* v. *Nixon*, 418 U.S. 683, 704 (1974); *Zweibon* v. *Mitchell*, 170 U.S. App. D.C. 1, 516 F.2d 594 (1975) *cert. denied* 425 U.S. 944 (1976).

[28] Defendants' Objections to Plaintiffs' Motion for Issuance of Letters Rogatory at 2. The Government repeatedly opposed discovery on foreign policy grounds, asserting that the matter before the court was a "purely legal issue." Defendants' Objections to Plaintiffs' Document Requests at 1-2. *See also* Defendants' Opposition to Motion to Compel Depositions of Messrs. Oakley, Teare and Monjo.

[29] Prospective practices could be submitted to the Senate for ratification and retroactive relief is equitable in nature and need not involve "bumping" of local nationals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND J. RASENBERGER
RANDY M. MOTT

ZUCKERT, SCOUTT & RASENBERGER
Attorneys for Respondents

OF COUNSEL:

J. STANLEY POTTINGER
WARREN L. DENNIS
CAROLYN DYE

TROY, MALIN & POTTINGER, P.C.

JUNE 18, 1981

APPENDIX A

House Appropriations Committee
Subcommittee
Hearing Transcript, , 1977
Page , following line

Practices and Policies in the Hiring of Foreign National Employees

1. The Department of Defense has a base labor agreement with the Government of the Philippines which provides preferential employment opportunities for Philippines. The GAO in report #B-182312 has concluded that this section is contrary to existing law. The existing law (P.L. 92-129) or 5 U.S.C. 7151, makes it illegal for the Department of Defense to discriminate against persons who are citizens of the U.S. or are dependents of members of the armed forces of the U.S. with respect to employment. Since the base labor agreement under discussion has not been ratified by the Senate as a treaty, the Department of Defense is violating current law. What steps has the Department taken to rectify this situation?

Answer: It is the opinion of the Department of Defense that the Base Labor Agreement between the United States and the Philippines dated May 27, 1968, constitutes a treaty as that term is used in Section 106 of Public Law 92-129 of September 28, 1971. Therefore, the provisions of the statute would not apply to the Agreement. The General Counsel of the Department of Defense outlined this position in his letter to the Assistant

General Counsel of the General Accounting Office dated June 21, 1975. This information was brought to the attention of the GAO in response to their request for DoD comments on report #B-182312.

Negotiations between the U.S.G. and GOP were begun in June 1976 on a new bases agreement. This new agreement, when finalized, will be submitted to the Senate for ratification.

Office of Origin: ODASD(CPP)/M&RA
Action Officer: William F. Coakley
Date Prepared: February 17, 1977
Coordination:

UNCLASSIFIED

APPENDIX B

Senator Robert B. Morgan
United States Senate
P.O. Box 2719
Raleigh, NC 27602

Dear Senator Morgan:

This is in further response to your letter of 3 June 1977 to the chief of Legislative Affairs on behalf of Ms. Shirley A. Ward. Ms. Ward has written you concerning her inability to obtain employment at the Naval Regional Medical Center in the Philippines.

The Commanding Officer of the Center has advised us that the Base Labor Agreement with the Republic of the Philippines provides for preferential employment of Filipino nationals and precludes the hiring of Ms. Ward by the Center. The Center neither employs nor is authorized any positions for U.S. Civil Service employees who are U.S. citizens.

The issue with which you and Ms. Ward are concerned is one that cannot be resolved at the local activity level. This matter is under study as a part of the treaty concerning the Military Bases Agreement currently being negotiated between the United States and Philippine governments. The finalized treaty, which will require ratification by the Senate, should resolve the question as to whether preferential employment of Filipinos is to continue.

We have been further advised that Ms. Ward has been employed since 31 May 1977 by the U.S. Naval Ship Repair Facility as a Security Clerk (Typing) GS-301-4. Her appointment is temporary, however, and will expire on 28 August 1977.

Your interest in this matter is appreciated and it is hoped that the above information will be of assistance.

Sincerely,

E. B. Riley
Acting Director
Personnel Management Division

Copy to:
NRMC Subic Bay
OCP PFD
OCP 05
OCP 9B34#7195
OLA#6-283
SECNAV
Prep. by: M. Moss, 261, x45893
Typed by: C. Brown, 261s, x45893 12 July 1977

Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1924

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1924

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v.

ANTHONY M. ROSSI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

Respondents correctly characterize (Br. in Opp. 2) the issue presented by this case as "solely a matter of statutory construction." That issue is whether the "treaty" exception in Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. (Supp. III) 7201 note, includes binding international agreements, such as the Base Labor Agreement of 1968 between the United States and the Republic of the Philippines (BLA), or is limited to Article II treaties, which must be approved and consented to by two-thirds of the Senate.

1. Respondents acknowledge (Br. in Opp. 3, 5) that, at the time Section 106 was adopted, *no* Article II treaty addressed the issue of hiring preferences, whereas there were in existence *at least 14* binding international agreements providing for preferential hiring of local nationals. Nonetheless, respondents argue that by enacting Section 106 Congress intended to abrogate every one of those agreements without ever adverting to them, much less to the ramifications such action would have in the international arena. But "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974). Contrary to respondents' contentions, therefore, we submit that "[t]he silence of the sponsors of [Section 106] is pregnant with significance * * * ." *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964).

Moreover, the record shows more than Congress' mere failure to mention the effect that Section 106 could have on the 14 existing international agreements. It also reflects that Congress perceived the need for an exception from the statute for "treaties," despite the fact that the Article II treaty format had never been employed to provide hiring preferences (Pet. 14). This strongly suggests a legislative understanding that *all* agreements concluded by the President and having the force of law between nations would be exempt from Section 106 by virtue of its "treaty" exception.

2. Section 106 was introduced as an amendment to a military pay bill. In the course of debate over that bill, Congress frequently expressed its concern with the poverty of American service members in Europe and the fact that many of their dependents

could not obtain employment in the local economies of host countries because of their tourist visa status. See 117 Cong. Rec. 16126 (1971).[1] This situation was drastically exacerbated by General Phipps' unilateral decision not to hire United States dependents in European Exchange System elements despite the Department of Defense Dependent Hire Program (see Pet. 15). That Senator Schweiker's introduction of Section 106 was directed against the Phipps memorandum rather than binding international agreements like the BLA is apparent from Senator Schweiker's response to a suggestion made in an article that appeared in *Stars & Stripes* (a semi-official newspaper produced for United States military personnel overseas). The article, parts of which were read into the record by Senator Schweiker, stated (117 Cong. Rec. 16128 (1971)) that

> [p]ortions of SOFA [the Status of Forces Agreement] could and should be changed to allow dependent wives to take many of the jobs now available solely to local nationals * * *.

Senator Schweiker responded (*ibid.*; emphasis added):

> Mr. President, let me interject there that we have done some research and find that, in Germany particularly, that is not the case. *Our commanding general who is head of the European Exchange System, Gen. Charles H. Phipps, in a memo of February 1971, issued this edict across Europe to all the stores and services in the exchange system:*

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[1] As we noted in the petition (at 16 & n.10), Congress' concern with service members' cost of living in Europe was irrelevant to the situation in the Philippines, where the cost of living is far below that in Europe.

> *For the reasons outlined above, I desire that the European Exchange System elements in the months ahead emphasize recruitment of local nationals and sharply deemphasize the utilization of United States dependents or tourists.*

Hence, it is clear that Senator Schweiker did not view as the problem the agreement in Germany (the NATO SOFA), but rather the type of situation that could be created by a single officer's order made in contravention of existing military policy of hiring dependents whenever possible. See 117 Cong. Rec. 16133 (1971) (remarks of Sen. Schweiker)).[2]

Respondents rely (Br. in Opp. 4-5), however, on the isolated statement by Senator Hughes (117 Cong. Rec. 16126 (1971)) that "[t]hose in the lowest ranks * * * are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located * * *." It is difficult to ascribe any weight to this ambiguous remark. Although respondents correctly point out (Br. in Opp. 6) that work permit visas are not required of United States dependents who are employed on United States

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[2] Respondents rely (Br. in Opp. 5) on the following excerpt from a study made by two Army psychiatrists concerning the poverty of United States service members stationed in Europe, which Senator Schweiker also read into the record (117 Cong. Rec. 16132 (1971)): "Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. These jobs are classified as local national jobs and American dependents cannot fill the jobs because of this classification." Contrary to respondents' implication (Br. in Opp. 5), however, Senator Schweiker's apparent endorsement of this statement is entirely consistent with his focus on the ability of a single officer (like General Phipps) to order preferential hiring of local nationals, even in contravention of existing military policy.

bases overseas, such visas are required of United States citizens who work in the local economies of host countries. It is unclear whether Senator Hughes was aware of this distinction, because he made the comment quoted by respondents in the context of a discussion (117 Cong. Rec. 16126 (1971)) concerning the inability of many dependents to obtain jobs in the local economies because of their tourist visa status. In any event, this single statement—otherwise unexplained, inconsistent with other debate on Section 106, and arising out of a confused and contradictory legislative record—is, we submit, far too fragile a basis for imputing to Congress an intent to abrogate at least 14 binding international agreements.[3]

3. Respondents also rely (Br. in Opp. 7 & nn.24-25) on representations by the Department of Defense that the BLA, when renegotiated, would be submitted to the Senate for its advice and consent. These statements, however, also contain explicit reaffirmations of the Department of Defense's consistent view that

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[3] Respondents also mention (Br. in Opp. 2) a statement in the Senate Report that the Hughes-Schweiker Amendment was intended to provide that "the *Department of Defense* cannot discriminate against American citizens or their dependents in employment on military bases" (S. Rep. No. 92-93, 92d Cong., 1st Sess. 23 (1971); emphasis added), but they fail to appreciate the significance of this statement. It plainly shows that the Amendment was designed to prohibit discrimination such as that ordered by General Phipps, *i.e.*, discrimination by the Department of Defense. The statement in the Senate Report cannot be read to mean that the Amendment was intended to eliminate all discrimination, however imposed, at Department of Defense installations, because even respondents admit that discrimination could continue to occur, despite Section 106, if authorized by "treaty."

the BLA, as a binding international agreement, is a "treaty" within the meaning of Section 106. See Br. in Opp. App. 1a-2a; Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment (filed Feb. 26, 1979), Attachments Three through Five (App., *infra*, 1a-6a). See also A. 214-215.[4]

More important, any representations that future base agreements would be submitted to the Senate for its advice and consent are irrelevant to the question whether the "treaty" exception to Section 106 includes previously-negotiated executive agreements, because such representations in no way suggest that preferential hiring provisions are *required* to be submitted pursuant to Article II in order to come within the "treaty" exception in Section 106. Indeed, the new agreement between the United States and the Republic of the Philippines referred to by the Department of Defense finally was concluded in January 1979 in the form of an international agreement that did not require Senate advice and consent. 30 U.S.T. 863, T.I.A.S. No. 9224 (Jan. 7, 1979).

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

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[4] "A." refers to the joint appendix filed in the court of appeals.

APPENDIX

[SEAL]

DEPARTMENT OF THE NAVY
U.S. NAVAL BASE
BASE INDUSTRIAL RELATIONS OFFICE
Box 31
FPO San Francisco 96651

In Reply Refer to:
NS80A:SKG:bs
5863
28 Jun 1977

The Honorable Jesse Helms
Post Office Drawer 28125
Raleigh, North Carolina 27611

Dear Senator Helms:

Acknowledgement is made of your letter of 26 May 1977 received by this office 27 June 1977 regarding Mrs. Shirley A. Ward. A similar letter was received from the Honorable Senator Robert B. Morgan who had received a duplicate of the letter forwarded to you by Mrs. Ward.

Mrs. Ward has been employed since 31 May 1977 by the U.S. Naval Ship Repair Facility as a Security Clerk (Typing), GS-301-4. This appointment is temporary and will expire on 28 August 1977.

Mrs. Ward's application indicates that she was employed at the Naval Regional Medical Center, Camp Lejeune, N.C. as a Medical Records Technician, GS-5, from June 1975 until December 1976. From November 1972 to June 1975 she was employed at the Medical Center as a GS-3 & 4 Coding Clerk (Typing). Her record at Camp Lejeune was commendable.

The Base Labor Agreement with the Republic of the Philippines does mandate preferential employment of Filipino nationals and effectively precludes the hiring of Mrs. Ward as a Medical Records Technician. This matter is under study as a part of the treaty concerning the Military Bases Agreement currently under negotiation between the United States and Philippine governments. The Naval Regional Medical Center, Subic Bay neither employs nor is authorized any positions for U.S. Civil Service employees who are U.S. citizens.

I am sympathetic with Mrs. Ward's predicament and regret that I cannot be of assistance.

Sincerely yours,

S. W. SANDBURG
Director

ATTACHMENT THREE
CA 78-2346

ENCLOSURE (2)

Ser 008/20
11 Jan. 1977

Dear Senator Proxmire:

This is in further response to your enclosed letter of November 16, 1976, concerning hiring practices at Naval Station, Subic Bay, Republic of the Philippines.

Philippine nationals at Subic Bay currently do enjoy certain employment preferences in relation to dependents of U.S. servicemen and other U.S. citizens. This is in conformance to the Base Labor Agreement dated May 27, 1968 (19 U.S. Treaties, 5892).

Your constituent's letter questions whether such practice is in accordance with law. Public Law 92-129, Title I, Section 106, Stat. 355, provides in pertinent part that "unless prohibited by treaty" a civilian shall not be discriminated against in his or her employment at any Department of Defense installation in a foreign country because of United States citizenship or because the civilian is a dependent of a member of the United States Armed Forces.

The position of the Department of Defense, as stated in a letter of June 24, 1975, from the General Counsel, Office of the Secretary of Defense, to the General Accounting Office, is that the Base Labor Agreement is considered to be a treaty within the contemplation of the cited statute. The General Accounting Office, in a letter dated July 28, 1976, has notified the Secretary of Defense of its opinion to the contrary. Nevertheless, a Secretary of Defense message has subsequently advised the Navy that, pending review of Defense's Office of General Counsel, Defense still considers the Base Labor Agreement to have the ef-

fect of a treaty. Accordingly, the required preferences are presently being extended.

The subject of employment preferences at Subic Bay is among those being addressed by the United States and Philippine governments during the current negotiation of a Military Bases Agreement.

Thank you for your interest in this matter.

Sincerely,

J.A. MAZZOLINI
Captain, U.S.N.
Deputy Naval Inspector General

The Honorable William Proxmire
United States Senate
Washington, D.C. 20510

Attachment Four
CA 78-2346

[SEAL]

DEPARTMENT OF THE NAVY
OFFICE OF CIVILIAN PERSONNEL
Washington, D.C. 20300

In Reply Refer to:
OCP 2611:tee
1 Apr 1977

Honorable Henry M. Jackson
United States Senate
Washington, D.C. 20510

Dear Senator Jackson:

This is in further response to your letter of 4 January 1977 on behalf of Ms. Maureen E. Conard. Ms. Conard wrote you concerning discrimination against employment of dependents in favor of foreign nationals at the Naval Station, Subic Bay, Philippines.

The basic proposition of Mrs. Conard's letter is that the current Base Labor Agreement with the Philippines, which provides for the preferential employment of Filipinos, is contrary to Public Law 92-129; that Public Law provides that, *unless prohibited by treaty,* no person shall be discriminated against by the Department of Defense in the area of employment of civilian personnel at Defense facilities in any foreign country due to his or her status as a U.S. citizen or a dependent of U.S. military personnel. Among matters raised by the General Accounting Office to the Secretary of Defense in April of 1975 was that of Public Law 92-129. In its response, the Office of the Secretary of Defense cited its opinion based upon court decisions and in-

ternational law that the Base Labor Agreement did constitute a treaty for the purpose of Section 106 of the Public Law. The current Department of Defense policy guideline in this area directs that the Base Labor Agreement with the Philippines should be considered as having the nature of a treaty. In view of Defense policy, preferential employment of Filipinos is not considered to be contrary to law.

Senate Report 92-S3 [*sic*], which reveals part of the intent of Congress in enacting the Public Law, states that the law is aimed at correcting a situation which exists primarily on some American bases in Europe. On those American bases, according to the Senate Report, preferential employment of local nationals has helped to create conditions of poverty for families of American enlisted men. This is not the situation in the Philippines, where the local price structure creates a favorable economic atmosphere for American service personnel and their dependents.

It should also be noted that the subject matter of this particular aspect of the Base Labor Agreement forms part of the deliberations concerning the Military Bases Agreement that are being renegotiated by the United States and the Philippines. Those negotiations were temporarily suspended last November by the Philippine government. There is currently no indication when the negotiations will resume. Since, however, the finalized treaty will require ratification by the Senate, it should resolve the question as to whether preferential employment of Filipinos is to continue.

Your interest in this matter is appreciated and it is hoped that the above information will be of assist-

ance. Ms. Conard's letter is returned as you requested.

Sincerely,

WM. N. PRICE
Director
Personnel Management Division

Enclosure

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Attachment Five
CA 78-2346

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No. 80-1924

In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the word "treaty" in Section 106 of Pub. L. No. 92-129, which prohibits employment discrimination against United States citizens on military bases overseas unless permitted by "treaty," encompasses all binding international agreements concluded by the President with the host country or is limited to agreements consented to by the Senate pursuant to Article II, Section 2 of the Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the parties to this case are petitioner John F. Lehman, Jr., Secretary of the Navy, and respondents Cindy L. Perry, Malinda Frierson, Fred E. Bumgarner, Camela Banks, Edna Horvath, Paul Chapman, Kenneth E. Oyler, James Vinson, A. H. Schilot, George Marshall, Herb Allen, Robert Wolbert, Rex W. Thomas, Elizabeth Taylor, Susan Keyes, Carroll E. Mason, Carlos F. Garcia, Clarence Labak, Richard Anderson, Beulah M. Jones, Pilar Galvin, Beverly Walker Pratt, Harold E. Shrader, Doris M. Chaisson, Karen S. Knapp, Patricia Procter, Gertrude A. Stevens, Arthur P. Fernandez, and Cynthia A. Roybal.

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In the Supreme Court of the United States

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v.

ANTHONY M. ROSSI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 642 F.2d 553. The opinion of the district court (Pet. App. 20a-39a) is reported at 467 F. Supp. 960. The administrative decision of the Navy (Pet. App. 41a-45a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46a-47a) was entered on September 15, 1980, and a petition for rehearing was denied on December 18, 1980 (Pet. App. 48a-49a). On March 13, 1981, the

Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 16, 1981, and the petition was filed on May 15, 1981. The Court granted the petition on October 5, 1981. The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. (Supp. III) 7201 note, provides:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

STATEMENT

1. In 1944 Congress authorized the President, "[a]fter negotiation with the President of the * * * Philippines * * * [and] by such means as he finds appropriate[,] to withhold or to acquire and to retain such [military and naval] bases, necessary appurtenances to such bases, and the rights incident thereto * * * as he may deem necessary for the mutual protection of the Philippine Islands and of the United States." 22 U.S.C. 1392. Pursuant to this

broad grant of authority and to its Filipino counterpart, in 1947 the United States and the Republic of the Philippines entered into a 99-year Military Bases Agreement (MBA), 61 Stat. 4019, T.I.A.S. No. 1775. The MBA grants the United States the use of various military facilities in the Philippines in exchange for certain commitments by the United States. This agreement has been amended periodically, most recently on January 7, 1979 (30 U.S.T. 863, T.I.A.S. No. 9224).[1]

The United States' continued use of these military facilities depends in large part on its respect for Philippine sovereignty and on stable labor relations with local employees. The MBA itself, however, contains no provisions concerning the employment of local nationals by the United States Armed Forces. To fill this void, and to assure a stable and reliable local workforce necessary to American defense interests in the Pacific, the United States and the Philippines negotiated a Base Labor Agreement (BLA), 19 U.S.T. 5892, T.I.A.S. No. 6542, on May 27, 1968, as a supplement to the MBA (Pet. App. 50a-62a). Article I of the BLA provides, *inter alia*, for the

[1] The major American military installations currently operating in the Philippines pursuant to the MBA are Clark Air Base and the Naval Facility at Subic Bay. Wallace Air Station, John Hay Air Base and San Miguel Naval Communications Station serve as supporting facilities. Clark Air Base supports United States air operations in the Western Pacific and East Asia, and Subic Bay supports the Seventh Fleet's operations in the Western Pacific and Indian Ocean. Together these facilities comprise the logistics hub for United States operations in Southeast Asia, the Southwest Pacific and the Indian Ocean areas and perform a significant range of essential services not available elsewhere in the region.

preferential employment of Filipino citizens at military facilities used by the United States in the Philippines (*id.* at 51a):

> *Preferential Employment.*—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens, except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed. Exception is permitted, however, in the case of third country nationals already employed on the date of entry into force of this Agreement and in the case of technical personnel of third country nationality as envisaged in paragraphs 1 and 2, Article XI of the Military Bases Agreement of 1947, as amended.

2. In 1971, Congress enacted Pub. L. No. 92-129, Section 106, 85 Stat. 355, now codified at 5 U.S.C. (Supp. III) 7201 note.[2] Section 106 prohibits employment discrimination by the Department of Defense or any of its officers or employees against American citizens or dependents of members of the United States Armed Forces at Department of Defense installations and facilities in foreign countries, unless such discrimination is permitted or required by "treaty."

At the time Section 106 was enacted, the United States was a party to more than a dozen binding international agreements that, like the BLA, provided some form of employment preference for local nationals but were not "treaties" within the meaning

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[2] Section 106 was previously codified at 5 U.S.C. 7151 note. The opinions and briefs below cite the prior codification.

of Article II, Section 2, Clause 2 of the United States Constitution.[3] Since the enactment of Section 106,

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[3] Article II, Section 2, Clause 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *."

In addition to the BLA, the following agreements were in effect at the time Section 106 was enacted: Mutual Defense Assistance Agreement, Nov. 21, 1956, United States-Republic of China, 7 U.S.T. 3411, 3412, T.I.A.S. No. 3713 (¶ 4); Defense Agreement Concerning Construction of Scatter Wave Radio Facility in Vicinity of Yangmingsham, Taiwan, Aug. 6, 1958, United States-Republic of China, 13 U.S.T. 2136, 2137, T.I.A.S. No. 5175 (¶ 2); Defense Agreement Concerning Construction of Communications Facility in Vicinity of Kaohsuing, Taiwan, Apr. 15, 1960, United States-Republic of China, 13 U.S.T. 2155, T.I.A.S. No. 5176; Defense Agreement Concerning Construction of Scatter Wave Control Facility in Vicinity of Yangmingshan, Taiwan, Feb. 28, 1962, United States-Republic of China, 13 U.S.T. 2158, T.I.A.S. No. 5177; Agreement Concerning the Status of United States Armed Forces in the Republic of China, Aug. 31, 1965, United States-Republic of China, 17 U.S.T. 373, 375, T.I.A.S. No. 5986 (Art. III.3); Agreement Concerning the Status of United States Personnel and Property (Annex), May 8, 1951, United States-Iceland, 2 U.S.T. 1533, 1542, T.I.A.S. No. 2295 (Art. VI); Agreement Concerning Bahamas Long Range Proving Ground: Administrative Arrangements Regarding Sites in Ascension Island, Aug. 24-25, 1959, United States-United Kingdom, 10 U.S.T. 1453, 1454, T.I.A.S. No. 4296; Agreement Concerning Oceanographic Research Stations in the Bahama Islands, May 12, 1960, United States-United Kingdom, 11 U.S.T. 1405, 1406, T.I.A.S. No. 4479; Agreement Concerning Atlantic Undersea Test and Evaluation Center in the Bahama Islands, Oct. 11, 1963, United States-United Kingdom, 14 U.S.T. 1431, 1441, T.I.A.S. No. 5441 (Art. IX); Agreement Concerning Defense Areas, Feb. 10, 1961, United States-West Indies, 12 U.S.T. 408, 413, T.I.A.S. No. 4734 (Art. VI); Agreement Concerning Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966,

the United States has entered into several additional international agreements that afford employment preferences to citizens of host countries but are not Article II treaties.[4] We are advised by the Department of State that no Article II treaty ever has addressed the subject of preferential hiring of local nationals at military facilities used by the United States abroad.[5]

United States-United Kingdom, 18 U.S.T. 28, 30, T.I.A.S. No. 6196 (¶ 7(a)). Memorandum of Understanding for the Establishment of the SEATO Clinical Research Center, Apr. 1 & 25, 1963, United States-Thailand, 14 U.S.T. 459, 462, T.I.A.S. No. 5340 (Art. IV. 2), as amended; Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, United States-Australia, 14 U.S.T. 506, 520, T.I.A.S. No. 5349 (Art. 15).

[4] Agreement Implementing Article V of the Treaty of Friendship and Cooperation, Jan. 31, 1976, United States-Spain, 27 U.S.T. 3095, 3128, T.I.A.S. No. 8361 (Art. XXXIII); Agreement Concerning Defense Areas and Facilities, Dec. 14, 1977, United States-Antigua, 29 U.S.T. 4183, 4187, T.I.A.S. No. 9054 (Art. VI); Agreement Concerning a Tracking Station of Mahe Island, June 29, 1976, United States-Seychelles, 27 U.S.T. 3709, 3721, T.I.A.S. No. 8385 (Art. XXIII); Agreement for Cooperation on Defense and Economy Between the United States and Turkey, Supplementary Agreement Number 3 on Installations, Mar. 29, 1980, Art. VI, T.I.A.S. No. 9901, at 18; Agreement in Implementation of Article IV of the Panama Canal Treaty, Art. VII, Sept. 7, 1977 (not yet published).

[5] This statement should be qualified in one minor respect. Article IX, paragraph 4 of the Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 1810, T.I.A.S. No. 2846 (NATO SOFA), which is an Article II treaty, provides that once a "sending State" (the state to which the military force belongs) determines to hire local nationals,

3. In March 1978, respondents Rossi, Bumgarner, Frierson and Perry were notified that their jobs as game room managers at the United States Naval Facility at Subic Bay were being converted into local national positions in accordance with Article I of the BLA and that they would be discharged from their employment with the Navy (Pet. App. 21a). Respondent Rossi filed what he styled as a "class action" administrative complaint, alleging that the Navy's termination of respondents' employment constituted unlawful discrimination against American citizens in violation of Section 106 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

"[t]he conditions of employment and work, in particular wages, supplementary payments and conditions for the protection of [local national] workers, shall be those laid down by the legislation of the receiving State." Thus, there conceivably could arise a situation in which, by virtue of NATO SOFA's incorporation of a local law more favorable to employees than its counterpart under United States law, a United States citizen or dependent would be afforded less favorable treatment (in aspects of employment other than the initial hiring) than a local national would receive. Indeed, in *Collins* v. *Brown*, Civ. No. 79-2598 (D.D.C., filed Sept. 28, 1979), currently pending on cross motions for summary judgment, two employees of the Army and Air Force Exchange Service (AAFES) claim that their positions with AAFES were downgraded, and a third employee claims that his employment with AAFES was terminated, in favor of local nationals, as a result of Germany's broader job security and retention protections. In *Collins*, the Secretary of Defense is relying on both Article IX, paragraph 4 of NATO SOFA and Article 56 of the Supplementary Agreement to the North Atlantic Treaty Organization Status of Forces Agreement, Aug. 3, 1959, 14 U.S.T. 531, 593-596, T.I.A.S. No. 5351, which incorporates in greater detail the applicable German labor laws.

(Pet. App. 22a; A. 226-232).[6] The Equal Employment Opportunity Office of the Navy rejected the complaint, concluding that it had no authority to modify the BLA (Pet. App. 41a-45a). In June 1978, respondent Rossi appealed to the Civil Service Commission Appeals Review Board (A. 233).

While the administrative appeal was pending, the four respondents were notified that their employment was to be terminated ahead of schedule pursuant to a reduction in force (Pet. App. 23a). Asserting jurisdiction under the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(3), and 28 U.S.C. 1331(a) and 1343(4), respondents sought a temporary restraining order enjoining petitioners from discharging them and barring them from the base. The United States District Court for the District of Columbia granted the restraining order, but subsequently denied respondents' motion for a preliminary injunction (Pet. App. 23a).

On cross-motions for partial summary judgment, the parties agreed that the validity under Section 106 of respondents' discharge depended on whether the word "treaty," as used in that statute, encompasses binding international agreements such as the BLA or is limited to treaties in the constitutional sense—*i.e.*, agreements consented to by the Senate in accordance with Article II. The district court concluded that the word "treaty" as used in Section 106 should be construed in the broader international law sense (Pet. App. 20a-39a). The court rejected respondents' contention that Congress' mere use of the word

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[6] "A." refers to the joint appendix filed in the court of appeals. On November 16, 1981, the Court granted the government's motion to dispense with the requirement of filing a joint appendix in this Court.

"treaty" in the statute is dispositive, noting (*id.* at 29a) that several courts, including this Court (see *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912)) "have held that executive agreements were 'treaties' within the meaning of an Act of Congress," and that Congress' imprecise drafting of Section 106 buttressed the conclusion that the word was not intended to have a restricted meaning (Pet. App. 30a). In addition, the court found (*id.* at 33a-34a) that "the legislative history would argue against [respondents'] contention that Congress intended to ban all discrimination on military bases abroad, even when pursuant to an agreement between nations."

In reaching this conclusion, the district court recognized (Pet. App. 37a) that it was treading "in an area fraught with sensitivity and affecting foreign affairs of the United States." The court observed (*id.* at 36a) that there were 12 international agreements containing employment preferences for local nationals at overseas American bases in effect when Section 106 was enacted, that none of those agreements had been submitted to the Senate for its advice and consent, and that two more such agreements had been entered into after the enactment of Section 106. Because the employment preference provisions contained in those agreements were part of the *quid pro quo* for the acquisition and retention of the United States' use of military facilities in foreign countries, the court concluded that it "should not lightly infer a Congressional intent to overturn portions of fourteen international agreements in the absence of *any* legislative history suggesting such an intent" (*id.* at 37a; emphasis in original).[7]

[7] Based on its conclusion that the BLA is a "treaty" within the meaning of Section 106, the district court also held (Pet.

The District of Columbia Circuit reversed (Pet. App. 1a-19a). The court of appeals acknowledged (*id.* at 8a-9a; footnote omitted) that "although the term 'treaty' under United States law normally connotes an agreement requiring the ratification of the Senate under Article II of the Constitution, * * * it does not invariably carry such a meaning" and that "[t]he meaning to be attributed to the word 'treaty' ultimately depends upon the intent of Congress in enacting the particular provision in which the term appears." The court of appeals also observed, after a review of the legislative history, that "the evidence [of congressional intent] is not extensive" (*id.* at 14a). Nonetheless, the court concluded that Congress had used the word "treaty" in Section 106 in its Article II sense and that it accordingly had intended, *sub silentio*, to compel the President either to terminate or to violate all existing international agreements containing local national employment preference provisions. In the court's view (*id.* at 15a n.30), Section 106 partially repealed the 1944 Act authorizing the President to negotiate and conclude agreements with the Philippines "by such means as he finds appropriate" (see page 2, *supra*) by withdrawing one method as inappropriate—agreements to employ local nationals, in preference to United States citizens or dependents of United States service members, for civilian positions on overseas mili-

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App. 37a-38a) that the specific provision in Section 106 permitting discrimination against American citizens in employment at overseas bases controls over the more general prohibitions against employment discrimination in Title VII. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974).

tary bases, unless such agreements were consented to by two-thirds of the Senate.[8]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the court of appeals invalidates a key provision of this country's Base Labor Agreement with the Republic of the Philippines and threatens the security and continued existence of the United States' rights to use military bases located in that country. Moreover, the decision below casts doubt on a dozen other international agreements containing local national employment preferences that were negotiated and concluded by the President as part of an effort to maintain an American military presence on foreign soil. This holding, if not reversed, could seriously disrupt United States relations with several foreign countries and threaten our national security.

We submit that "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974). As we show below, Congress "said so expressly" neither in the statutory language of Section 106 nor in the legislative history of that provision. To the contrary, Congress' use of the word "treaty" in Section 106 is consistent with an intent to include all international agreements, not only Article II treaties, and the legislative history shows that the section was directed at eliminating employment preferences im-

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[8] In view of its conclusion that the BLA is not a "treaty" within the meaning of Section 106, the court of appeals did not reach the question whether the BLA hiring preference provision violates Title VII (Pet. App. 19a n.36).

posed by individual military commanders rather than as part of binding international agreements.

A.

Congress' use of the word "treaty" in Section 106 does not indicate an intent to limit the "treaty" exception to Article II treaties. As the court of appeals acknowledged (Pet. App. 5a), the term "treaty" has two distinct usages in the United States. When used in its international relations sense, the word "treaty" refers to all binding agreements between nations that are governed by international law, regardless of the manner in which they are brought into force. In its constitutional sense, however, the term is limited to those international agreements that are brought into force pursuant to the power granted to the President by Article II, Section 2, Clause 2 of the Constitution to make treaties "by and with the Advice and Consent of the Senate, * * * provided two thirds of the Senators present concur; * * *."

The meaning to be attributed to the word "treaty" in a statute ultimately depends upon the intent of Congress. In determining that intent, the courts have focused on the context in which the word appears, the legislative history, and the purposes to be served by the statutory provision. *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912). Here, the context strongly suggests that Congress intended the word "treaty" in Section 106 to be defined according to the usages of international law. Section 106 has no domestic impact; its only impact is upon actions of the United States in those foreign countries in which the Department of Defense is permitted by international agreement to use military facilities or installations. Because Congress in Section 106 was

legislating in an area touching directly on international relations, it is reasonable to assume that it used the word "treaty" in that statute in its international relations sense, as including all forms of binding agreements between the United States and a foreign country.

This conclusion is buttressed by the imprecise drafting of Section 106. As the district court noted (Pet. App. 30a), the language Congress employed elsewhere in the section is so confusing as to rebut any notion that it used the word "treaty" in the strict and technical sense suggested by respondents.

B.

In determining the meaning of an ambiguous statutory provision, it is appropriate to rely on "generalized axioms of experience in construing legislation." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). Here, the rule that repeals by implication are disfavored and the presumption that Congress will not place the United States in violation of a binding international obligation counsel against the result reached by the court of appeals.

Limiting the meaning of the word "treaty" in Section 106 to Article II treaties would not only partially repeal the 1944 Act authorizing the President to withhold, acquire or retain military bases in the Philippines "by such means as he finds appropriate" (22 U.S.C. 1392). It would also require the United States to breach what the Philippines views as a key provision of the BLA, with unpredictable consequences for our relations with that nation and for the United States' continued use of military facilities located there. Moreover, the United States remains a party to several other binding international agree-

ments that, like the BLA, provide some form of employment preference for local nationals in exchange for the right to maintain a United States military presence on foreign soil, but are not Article II treaties. The court of appeals' construction of Section 106 casts the validity of these agreements in doubt as well. Such drastic consequences should not be attributed to Congress in the absence of any evidence of an intent to bring them about.

C.

No such intent appears in the legislative history of Section 106. To the contrary, the legislative history suggests that Congress did not intend to disturb any international agreement. First, the legislative reports and debates contain no reference to the several international agreements then in existence that established local national employment preferences but were not Article II treaties. Moreover, at the time Section 106 was enacted, the Article II format never had been employed to establish local hiring preferences. It is most unlikely that Congress intended to invalidate more than a dozen binding international agreements without even alluding to them, while enacting a statute addressing a situation that had never existed. Furthermore, the consistent statements of Senator Schweiker, the sponsor of Section 106, clearly explain that that provision was directed only against preferential hiring practices mandated by the actions of individual base officers, and not against binding commitments of this country given in exchange for important rights to use military facilities abroad.

D.

Finally, since the enactment of Section 106, the Department of State and the Department of Defense have continued to negotiate and implement international agreements other than Article II treaties that contain local national employment preferences. Congress has been informed of these agreements pursuant to the Case Act, 1 U.S.C. (Supp. III) 112b, which requires congressional notification of all international agreements other than Article II treaties, and through testimony presented to congressional committees. Congress, however, has not chosen to alter this consistent administrative construction.

ARGUMENT

THE WORD "TREATY" AS USED IN SECTION 106 OF PUB. L. NO. 92-129 INCLUDES ALL INTERNATIONAL AGREEMENTS BINDING ON THE UNITED STATES

A. The Language of Section 106 May Reasonably Be Construed to Include All Binding Agreements Within Its "Treaty" Exception

As with any case involving the interpretation of an Act of Congress, "we begin with the language of the statute." *Haig* v. *Agee*, No. 80-83 (June 29, 1981), slip op. 8. Accord, *American Textile Manufacturers Institute, Inc.* v. *Donovan*, No. 79-1429 (June 17, 1981), slip op. 16. Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. (Supp. III) 7201 note, provides in pertinent part:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Depart-

> ment of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States.

The word "treaty," read in context, includes binding international agreements such as the BLA.

1. ***The Word "Treaty" Has Two Different Meanings in the United States, Depending on the Context in Which it is Used***

a. As both the district court and the court of appeals recognized (Pet. App. 5a-9a, 25a-26a), the word "treaty" has two distinct but commonly accepted usages in the United States. When used in its international relations sense,

> "treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation * * *.

Vienna Convention on the Law of Treaties, May 23, 1969, Art. 2, ¶ 1(a), *reprinted in* 63 Am. J. Int'l L. 875, 876 (1969).[9] See also *Restatement of the Foreign Relations Law of the United States* § 302, comment *b* (Tent. Draft No. 1, Apr. 1980). Consent to such a treaty may be expressed in any of a variety

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[9] Although the Vienna Convention is not yet in force for the United States, it has been recognized as an authoritative source of international treaty law by the courts (see, *e.g.*, *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 33, 36 (2d Cir. 1975), cert. denied, 429 U.S. 980 (1976)) and the executive branch (see, *e.g.*, letter of submittal of Vienna Convention to the President from the Secretary of State 1 (Oct. 18, 1971)).

of forms: "by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." Vienna Convention on the Law of Treaties, *supra*, Art. 11, 63 Am. J. Int'l L. at 878. Thus, the word "treaty," when used in this context, includes all binding written agreements among nations that are governed by international law,[10] regardless of the manner in which the agreements are brought into force.

In its constitutional sense, however, the word "treaty" refers to an international agreement that is brought into force pursuant to the power granted to the President by Article II, Section 2, Clause 2 of the Constitution to make treaties "by and with the Advice and Consent of the Senate, * * * provided two thirds of the Senators present concur; * * *."

b. Despite these distinct meanings, the word "treaty" is frequently used imprecisely. Both Con-

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[10] The principle that "treaties," in the international relations sense, are agreements among nations that are governed by international law (as well as the presumption that any agreement among nations is governed by international law) has been codified in new regulations issued by the Department of State to implement the Case Act, 1 U.S.C. (Supp. III) 112b (see note 25, *infra*). 46 Fed. Reg. 35918 (1981). See also *Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. 241 (1976) (responses by Monroe Leigh, Legal Adviser, Department of State, to questions submitted by the Subcommittee); *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 329-330 (1972) (statement of J. Fred Buzhardt, General Counsel, Department of Defense).

gress and the courts have used the term in its international relations sense and its constitutional sense without making clear which meaning is intended. Accordingly, where the intended definition of the word is not immediately apparent, its meaning must be determined by reference to the context in which the word is used and the underlying intent of the drafter. "As in all cases of statutory construction," the term "treaty" must be interpreted "in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

In *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), for example, the Court considered whether the word "treaty" in the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, 827-828, which provided for direct appeal to this Court in cases involving the construction of "treaties," included international agreements to which the Senate had not consented. The agreement in question, which concerned important commercial relations between the United States and France, had not been submitted to the Senate pursuant to Article II of the Constitution. In holding that the agreement nonetheless was a "treaty" for purposes of the Circuit Court of Appeals, Act, the Court looked to the legislative intent and concluded that Congress "thought [it] best to preserve the right to a review by direct appeal * * * in certain matters of importance, and, among others, those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations *of that character* to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving

the peace of nations, should be subject to direct and prompt review by the highest court of the Nation" (224 U.S. at 600-601; emphasis added). Thus, even with regard to a subject matter as quintessentially domestic as the rules of procedure for direct appeal to this Court, the Court interpreted the word "treaty" in its international sense, as including all binding agreements among nations.

Similarly, this Court has held that "all international compacts and agreements" are to be accorded a dignity similar to that of a treaty made with the advice and consent of the Senate for the purpose of determining the validity of conflicting state law. In *United States* v. *Pink*, 315 U.S. 203, 222-223, 228-230 (1942), and *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937), the Court held that the Litvinov Assignment, by which the Soviet Union assigned certain claims it held against American nationals to the United States as part of this Nation's recognition of the Soviet government, although not approved by the Senate, had the effect of an Article II treaty, thus making it supreme over any inconsistent law or policy of New York State.[11]

The Court of Claims also has interpreted Congress' use of the word "treaty" as a reference to any binding international agreement. Specifically, the Court of Claims has construed the word "treaty" in 28 U.S.C. 1502, which provides that that court shall not have jurisdiction over claims against the United States

[11] More recently, in *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), the Court confirmed that the sovereign authority of the United States to settle claims of its nationals against a foreign state may be implemented by "executive agreement without the advice and consent of the Senate" as well as by a treaty in the constitutional sense (slip op. 20-21; footnote omitted).

"growing out of or dependent upon any treaty entered into with foreign nations," as including all international agreements. See *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889, 903 & n.17 (1976); *Yassin* v. *United States*, 76 F. Supp. 509, 517 (1948). The court explained that "[t]he reason for this equation is that the fundamental separation-of-powers policy underlying § 1502, *i.e.*, to avoid undue judicial interference (*e.g.*, by construction of particular treaty terms and provisions) with the Executive Branch's conduct of foreign relations, is equally applicable to both forms of international compact." *Hughes Aircraft Co.* v. *United States*, *supra*, 534 F.2d at 903 n.17.[12]

Indeed, Congress has used the word "treaty" in statutes that refer *only* to international agreements other than Article II treaties. For example, 39 U.S.C. 407(a) provides that

> [t]he Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions * * *. The decisions of the Postal Service construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be conclusive upon all officers of the Government of the United States.

Such "treaties" or conventions, however, which, by the terms of the statute, require only the consent of the President, are not Article II treaties. See *United*

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[12] In *Dames & Moore* v. *Regan*, *supra*, slip op. 31, this Court also implicitly recognized that the "treaty" exception to the Court of Claims' jurisdiction in 28 U.S.C. 1502 would include executive agreements such as the agreement between the United States and Iran, which was involved in that case.

States v. *Four Packages of Cut Diamonds*, 247 F. 354, 358 (S.D.N.Y. 1917); Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577, 588-589.[13]

Moreover, when Congress intends to refer solely to Article II treaties, it can be quite explicit. For purposes of the Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, Congress specifically defined the term "treaty" to mean "any international fishery agreement which is a treaty within the meaning of Section 2 of Article II of the Constitution." 16 U.S.C. 1802(23). Similarly, in the Arms Control and Disarmament Act, 22 U.S.C. (& Supp. III) 2551 *et seq.*, Congress authorized the Director of the Arms Control and Disarmament Agency to prepare

> recommendations concerning United States arms control and disarmament policy: *Provided, however,* That no action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States; except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

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[13] Courts on occasion also use the word "treaty" to refer to an international agreement that is not an Article II treaty. See, *e.g.*, *Cotzhausen* v. *Nazro*, 107 U.S. 215, 217-218 (1883) (referring to the Treaty Concerning the Formation of a General Postal Union, *supra*, as a "treaty"); *Natural Resources Defense Council* v. *NRC*, No. 80-1477 (D.C. Cir. Mar. 30, 1981), slip op. 14 n.15 (using the word "treaty" to refer to the Agreement for Cooperation Concerning Civil Uses of Atomic Energy, June 13, 1968, United States-Philippines, 19 U.S.T. 5389, T.I.A.S. No. 6522, which is not an Article II treaty).

22 U.S.C. 2573. See also 15 U.S.C. 713a-7 ("whenever the President, by and with the advice and consent of the Senate, has concluded a treaty involving the exchange of surplus agricultural commodities produced in the United States which are held under loans made or made available by the Commodity Credit Corporation for stocks of strategic and critical materials produced abroad, the Commodity Credit Corporation is authorized * * * to accept such strategic and critical materials in exchange for such surplus agricultural commodities * * *").[14]

2. *The Context of Section 106 Suggests That the Word "Treaty" Was Used in That Statute in its International Relations Sense*

We have shown above that the use of the word "treaty" in a statute is not dispositive of congressional intent. A determination of whether the term was used in its international relations or its constitutional sense depends in large part on the context in which the term appears. Here, that context strongly suggests that Congress intended the word "treaty" to be defined according to the usages of international law.

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[14] 1 U.S.C. 112a, which requires the Secretary of State to cause the compilation and publication of "all treaties * * * and all international agreements other than treaties to which the United States is a party," and the Case Act, 1 U.S.C. (Supp. III) 112b, which requires the Secretary of State to transmit to Congress "the text of any oral international agreement, * * * other than a treaty, to which the United States is a party," are other examples of statutes in which Congress has made explicit by language or context (see note 25, *infra*) that it was using the word "treaty" in its constitutional sense. Congress did not do so in Section 106.

Section 106 provides, in pertinent part, that "no person shall be discriminated against by the Department of Defense * * * in the employment of civilian personnel at any facility or installation operated by the Department of Defense *in any foreign country* * * *" (emphasis added). The statute thus has no domestic impact. Rather, its only impact is upon actions of the United States in those foreign countries in which the Department of Defense is permitted to operate facilities or installations under applicable international agreements.

Whether the United States enters into an agreement with another country by means of an Article II treaty or some other form of international agreement, however, is a matter solely of domestic concern.[15] Obligations incurred by the United States and another nation are equally binding under international law, regardless of whether they are contained in an Article II treaty or some other form of international agreement. Accordingly, because Congress in Section 106 was legislating in an area touching directly on international relations, it is reasonable to assume that it used the word "treaty" in that statute in its international relations sense, as including all forms of binding agreements between the United States and a foreign country.

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[15] That domestic concern is the manner in which the agreement is brought into force—either by action of the President, with the advice and consent of two-thirds of the Senate, by action of the President pursuant to an Article II treaty, by action of the President pursuant to an Act of Congress ("congressional-executive agreements") or by action of the President alone ("sole executive agreements"). See L. Henkin, *Foreign Affairs and the Constitution* 173-177 (1972); *Restatement of the Foreign Relations Law of the United States* §§ 302(b), 306-308 (Tent. Draft No. 1, Apr. 1980).

Indeed, this conclusion is buttressed by the imprecise drafting of Section 106. As the district court observed, the language employed by Congress elsewhere in the section is so confusing as to rebut any notion that it used the word "treaty" in the strict and technical sense suggested by respondents (Pet. App. 30a; emphasis in original):

> Section 106 provides that "[u]nless *prohibited* by treaty, no person shall be discriminated against . . . ." [Petitioners] point out quite correctly that the term "prohibited" in this context is awkward, at best. It would have been more appropriate to state that "unless provided by treaty", or "unless permitted by treaty", no discrimination could occur. Whether the use of "prohibited" is an indication of sloppy draftsmanship or a more subtle intention of Congress cannot be ascertained at this point. The court does consider this confusing language significant, however, in evaluating [respondents'] contention that Congress chose its words carefully and meant just what it said when it used the word "treaty".

B. Principles of Statutory Construction Support An Interpretation Of The Word "Treaty" In Section 106 In Its International Relations Sense

In determining the meaning of an ambiguous statutory provision, it is appropriate to rely on "generalized axioms of experience in construing legislation." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). Two settled principles of statutory construction apply to this case. The first is that repeals by implication are not favored. The second is that Congress will not be presumed to have placed the United States in violation of a binding in-

ternational obligation in the absence of a clearly expressed intention to do so. As we show below, both principles counsel a result contrary to the one reached by the court of appeals.

1. *Repeals by Implication Are Not Favored, Particularly When the Object of the Alleged Repeal is a Binding International Obligation*

It is by now axiomatic that repeals by implication are not favored. *Watt* v. *Alaska*, No. 79-1890 (Apr. 21, 1981), slip op. 7-8; *United States* v. *Will*, 449 U.S. 200, 221 (1980); *TVA* v. *Hill*, 437 U.S. 153, 189 (1978). As the Court remarked in *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974):

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

This principle applies with special force when the allegedly repealed provision is a binding international obligation. The Court long ago held that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *." *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See also *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953). In the absence of a clear legislative intent, statutes thus are to be construed so that they

do not conflict with customary international law or, *a fortiori*, existing provisions or obligations under binding international agreements. As Justice Brandeis wrote for the Court in *Cook* v. *United States*, 288 U.S. 102, 120 (1933), "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." Accord, *United States* v. *Payne*, 264 U.S. 446, 448 (1924) ("an intention to alter, and, *pro tanto*, abrogate [a] treaty, is not to be lightly attributed to Congress"); *Chew Heong* v. *United States*, 112 U.S. 536, 539, 549-550 (1884) ("the court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another country"). See also *Moser* v. *United States*, 341 U.S. 41, 45-46 (1951); *Clark* v. *Allen*, 331 U.S. 503, 510-514 (1947); *Restatement (Second) of the Foreign Relations Law of the United States* § 145, comment b (1965); L. Henkin, *Foreign Affairs and the Constitution* 171 (1972); C. Hyde, *International Law Chiefly As Interpreted And Applied By The United States* 1464 (1947).

The rule that an intent to abrogate existing international obligations will not lightly be presumed from subsequent congressional action is not limited to commitments with other nations contained in Article II treaties.[16] To the contrary, it is a cardinal principle

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[16] A distinction between Article II treaties and other forms of international agreements would make no sense in this context. In view of the great number of international agreements other than Article II treaties to which the United States is a party (see L. Henkin, *supra*, at 173, 420 n.1) and the fact that international law recognizes no distinction between the two forms of agreement (see page 23, *supra*), a domestic presumption in favor of the continued viability of

of international law that "[*e*]*very* [international agreement concluded between states] is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra*, Art. 2(1)(a) and 26, 63 Am. J. Int'l L. at 876, 884 (emphasis added). Because repudiation of an international agreement would have the same repercussions as the abrogation of a treaty, the rule against implied repeal is equally applicable to both forms of commitment.

Moreover, this Court has described the Executive "as the sole organ of the federal government in the field of international relations * * *. [H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries * * *. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).[17] See *Haig* v.

Article II treaties alone surely would detract from the United States' credibility in the international arena.

Moreover, to whatever extent the presumption that Congress does not intend to abrogate pre-existing international agreements is based on the Senate's participation in the conclusion of Article II treaties, the presumption also applies to "congressional-executive agreements" (see note 15, *supra*), such as the MBA (see *Williams* v. *Rogers*, 449 F.2d 513, 520 & n.12 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972)) and the BLA. As noted above (see pages 2-3, *supra*), both the MBA and the BLA were concluded pursuant to Congress' broad grant of authority to the President "by such means as he finds appropriate[,] to withhold or to acquire and to retain such [military and naval] bases, necessary appurtenances to such bases, and the rights incident thereto * * * as he may deem necessary for the mutual protection of the Philippine Islands and of the United States" (22 U.S.C. 1392).

[17] Of particular note in the context of the present case is this Court's characterization in *Curtiss-Wright* of "the power

Agee, *supra*, slip op. 10, 26; *Chicago & Southern Air Lines, Inc.* v. *Waterman, SS. Corp.*, 333 U.S. 103, 109-111 (1948); *United States* v. *Belmont*, *supra*, 301 U.S. at 330. See also *Goldwater* v. *Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring); *id.* at 1006-1007 (Brennan, J., dissenting). In view of the paramount role in the conduct of foreign affairs that the Constitution has delegated to the Executive, it is most unlikely that Congress would ever intend, without saying so, to force this Nation to renege on an international obligation undertaken by the President (either with or without the Senate's advice and consent). Cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, *supra*, 372 U.S. at 20 (construing the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, as not applying to the foreign crew of a vessel flying a foreign flag because, *inter alia*, such a construction would be contrary to the recognition long afforded such vessels by the Department of State).

2. The Decision of the Court of Appeals Forces the United States to Breach an Agreement Made With a Foreign Country in Exchange for Significant Considerations Within That Country's Territory

Limiting the meaning of the word "treaty" in Section 106 to Article II treaties would not only partially repeal the 1944 Act authorizing the President to withhold, acquire or retain military bases in the Philippines "by such means as he finds appropriate" (see page 2, *supra*), as the court of appeals noted (Pet.

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to make such international agreements as do not constitute treaties in the constitutional sense" (relying on *B. Altman & Co.* v. *United States*, *supra*) as "inherently inseparable from the concept[] of nationality." 299 U.S. at 318.

App. 15a n.30). It also would impliedly "repeal" this Nation's commitment to the Philippines—given in exchange for that country's granting the United States the right to use military facilities located in the Philippines—to fill the needs for civilian employment at the bases used by the United States with Filipino citizens in accordance with the terms of the BLA. Such an implied "repeal," however, notwithstanding whatever effect it may have for *domestic* purposes,[18] would have no effect upon the United States' binding *international* obligation under the BLA to prefer Filipino citizens for civilian employment on the bases. See L. Henkin, *supra*, at 164; C. Hyde, *supra*, at 1465; *Restatement (Second) of the Foreign Relations Law of the United States*, *supra*, at § 145(2).

The Base Labor Agreement and the Military Bases Agreement, which it supplements, are inextricably related to the United States' relations with the Philippines, as well as to this Nation's security and defense (see note 1, *supra*). The agreements define the conditions under which the United States is permitted to maintain a military presence in the Philippines, a presence that is vital to the protection of United States' interests in the Middle East and the Indian and Pacific Ocean regions. The provision of the BLA that gave rise to this lawsuit—the United States' obligation to satisfy its needs for civilian employment

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[18] Section 145(1) of the *Restatement (Second) of the Foreign Relations Law of the United States*, *supra*, provides that "[a]n Act of Congress enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supersedes it as domestic law of the United States, if the purpose of Congress to supersede the agreement is clearly expressed."

with Filipino citizens—has been a significant *quid pro quo* for the Philippines to permit the United States to use military bases located on its soil. As the Department of State remarked in 1977, the question of civilian employment on bases used by the United States in the Philippines "has long been a sensitive one. The Government of the Philippines believes that at military bases on Philippine territory it is appropriate that Filipino citizens be employed to the maximum extent possible. The Government of the Philippines has been adamant on that point, and the limited exceptions provided for in Article I of the Base Labor Agreement are the only concessions it has been willing to grant in this respect." Letter from Kempton B. Jenkins, Acting Assistant Secretary of State for Congressional Relations, to Senator Henry M. Jackson, dated Feb. 7, 1977 (A. 211).[19] Affirmance of the decision below thus would require the United States to breach what the Philippines views as a key provision of the BLA, with unpredictable consequences for our relations with that country and for the United States' continued use of military facilities located there.

In addition, the United States remains a party to several other binding international agreements that, like the BLA, provide some form of employment preference for local nationals in exchange for the right to maintain a United States military presence on foreign soil, but are not Article II treaties (see notes 3 and 4,

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[19] As of June 30, 1981, the Department of Defense employed 13,600 Filipino citizens at its military facilities in the Philippines. Department of Defense, Total Civilian Personnel Strengths By Regional Area And By Country, Military Functions—Summary (June 30, 1981), Table P309B at 2.

supra).[20] It is even more difficult to predict the consequences that a breach of the BLA by the United States would have on its relations with these other countries and on the continued availability to the United States of the military facilities located there. One fair assumption, however, is that the court of appeals' decision, unless reversed, undoubtedly will hamper the United States' ability to negotiate for and maintain base rights and other military advantages in the Philippines and elsewhere.[21] It strains credulity to suggest that Congress would have intended such drastic consequences in the absence of a clearly expressed legislative intent to bring them about. As this Court stated in *Clark* v. *Allen*, *supra*, 331 U.S. at 511-512 (footnotes omitted), in rejecting the argument that the power to vest alien property in an agency of the United States arising out of the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*, impliedly repealed the right to inherit granted to resident German aliens under the pre-existing Treaty of Friendship, Commerce and Consular Rights with Germany, Dec. 8, 1923, 44 Stat. 2132 *et seq.*:

> To give the power to vest [that] effect * * * would, indeed, prove too much. * * * Provisions

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[20] The agreements between the United States and the Republic of China (Taiwan) cited in note 3, *supra*, have been terminated. See Department of State, *Treaties in Force* 244-246 (Jan. 1, 1981).

[21] The Article II treaty process is time consuming and may not be feasible in some situations. Moreover, the Department of State advises us that foreign countries frequently wish to avoid the formality and high visibility of an Article II treaty. The decision below, which would require every international agreement containing local national hiring preference provisions to be in the form of an Article II treaty, thus substantially reduces negotiating flexibility.

comparable to that contained in [the treaty with Germany] are found in existing treaties with friendly nations. We will not readily assume that when Congress * * * authorized the vesting of property, it had a purpose to abrogate all such treaty clauses.

C. The Legislative History Supports A Construction Of The Word "Treaty" In Section 106 That Includes All Binding International Agreements

1. *The Legislative History Makes No Mention Of The Several Existing International Agreements That Would Be Called Into Question If The Word "Treaty" In Section 106 Were Construed In Its Constitutional Sense*

The legislative history of Section 106 is concededly sparse (Pet. App. 9a, 31a, 32a n.4). The expressions of congressional intent that do exist, however, do not support the court of appeals' construction of the statute. Indeed, the legislative record is more significant for what it does not contain—*any* expression of a congressional intent to abrogate provisions in the numerous existing agreements with allies providing employment preferences for local nationals. We submit that "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974).

At the time Section 106 was enacted, at least 14 binding international agreements, none of which had been submitted to the Senate, provided for local national employment preferences at military facilities in foreign countries used by the United States.[22] Nowhere in the legislative history of Section 106 is there

[22] See note 3, *supra*.

any mention of these existing international agreements or any discussion of the impact that Section 106 would have on them. Nor was there any testimony by the Department of State or the Department of Defense concerning the anti-discrimination provision, as there surely would have been had the validity of these existing international agreements been subject to challenge.

Moreover, Congress obviously felt the need to include an exception for "treaties" in Section 106, yet the Article II format had never been employed to establish local national hiring preferences at military bases used by the United States abroad.[23] Congress' failure to discuss the impact that Section 106 would

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[23] The criteria used to determine the form that the United States should use in entering into an international agreement are contained in 11 Foreign Affairs Manual, Chapter 700 (Oct. 25, 1974) (usually referred to as the Circular 175 Procedures). These criteria include: (a) the extent to which the agreement involves commitments or risks affecting the nation as a whole; (b) whether the agreement is intended to affect state laws; (c) whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; (d) past United States practice as to similar agreements; (e) the preference of the Congress as to a particular type of agreement; (f) the degree of formality desired for an agreement; (g) the proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and (h) the general international practice as to similar agreements. 11 Foreign Affairs Manual, *supra*, at 721.3. The foregoing criteria support the traditional use of a non-Article II format for negotiating labor rights on foreign bases. See *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 256-258 (1972) (statement of John R. Stevenson, Legal Adviser, Department of State).

have on the binding international agreements then in force, combined with the absence of any Article II treaties addressing the hiring preference issue, strongly suggests a legislative understanding that all agreements concluded by the President and having the force of law in the international arena would be exempt from Section 106 by virtue of its "treaty" exception.

2. The Legislative History Indicates That Section 106 Was Directed Against Actions By Individual Military Base Commanders Rather Than Against International Agreements Concluded By The President

Further evidence of Congress' intent to include all binding international agreements within the meaning of the word "treaty," as used in Section 106, is supplied by the scant legislative history that does exist.

The provision that became Section 106 was added to H.R. 6531, 92d Cong., 1st Sess. (1971) (which was later enacted as Pub. L. No. 92-129) under the sponsorship of Senator Schweiker, while H.R. 6531 was under consideration by the Senate Committee on Armed Services. See 117 Cong. Rec. 14395 (1971) (remarks of Sen. Stennis); *id.* at 16126 (remarks of Sen. Cook); *id.* at 16133 (remarks of Sen. Schweiker). See generally S. Rep. No. 92-93, 92d Cong., 1st Sess. 6, 23 (1971). Subsequently, Senator Schweiker, together with, among others, Senator Hughes, sponsored a much broader amendment to H.R. 6531. That broader amendment, which came to be known as the Hughes-Schweiker Amendment, called for a limitation of the extension of the military draft from two years to one year and for increases in military pay. See 117 Cong. Rec. 16120-16121, 16128, 16132 (1971) (remarks of Sen. Schweiker); *id.* at

16123 (remarks of Sen. Hughes); S. Rep. No. 92-93, *supra*, at 62-63 (supplemental views of Sens. Symington, Schweiker and Hughes). It appears that the only references to Section 106 occurred within the context of Congress' consideration of the much broader, but closely related, issue of military pay raised by the Hughes-Schweiker Amendment.

Debate concerning the military pay aspect of the Hughes-Schweiker Amendment focused on the economic hardship suffered by many American service members overseas, which was caused in part by the fact that their dependents could not obtain employment in the local economies because of their tourist visa status. See 117 Cong. Rec. 16126 (1971) (remarks of Sens. Cook and Hughes). That situation had been drastically exacerbated by the unilateral action of the Commanding General of the European Exchange System (EES), General Charles H. Phipps. In early 1971, in an effort to reduce "spiraling wage costs," General Phipps had issued a memorandum encouraging all EES elements to recruit and hire local nationals. See 117 Cong. Rec. 14394-14397, 16128, 16133 (1971) (remarks of Sen. Schweiker).

During the floor debates, Senator Schweiker focused on the Phipps memorandum and on the plight of American service members in Germany's expensive economy. 117 Cong. Rec. 14394-14397, 16128-16129, 16131-16133 (1971). His remarks indicate outrage at General Phipps' unilateral action, which Senator Schweiker viewed as insensitive to the economic circumstances of American soldiers and their families (*id.* at 14395; emphasis added):

> I have never heard of anything so ridiculous in my life. We actually send our GI's to Europe at poverty wages. We do not pay to send the wives there. They have to beg or borrow that

> money. They get over there, and if they do bring their wives at their own expense, the wives cannot even go to the Army Exchange Service and get a job, *because a general has sent out a memorandum that says we are going to give those jobs to the nationals of the countries involved.*
>
> How ridiculous can one policy be? No wonder we do not have an all-volunteer army. No wonder we do not have people volunteering, with that kind of rank discrimination against the wives of American citizens.
>
> * * * * *
>
> I cannot imagine that any other country in the world would treat its citizens in that way—bar none.

General Phipps' action, however, was not mandated by any international agreement; indeed, it violated the Department of Defense policy embodied in the Dependent Hire Program. 117 Cong. Rec. 16133 (1971) (remarks of Sen. Schweiker). See also *Authorization for Average Annual Strengths for the Military Services for Fiscal Year 1972: Supplemental Manpower Hearing on H.R. 6531 Before the Senate Comm. on Armed Services*, 92d Cong., 1st Sess. 77 (1971) (statement concerning employment of dependents of military and civilian personnel in foreign areas).

That Senator Schweiker's addition of Section 106 in committee was directed against actions of individual officers, like General Phipps, rather than against binding international obligations of the United States, like those contained in the BLA, is apparent from Senator Schweiker's responses to two suggestions made in an article that appeared in *Stars & Stripes* (a semi-official newspaper produced for United States personnel abroad), parts of which he

read into the record (see 117 Cong. Rec. 16128-16129, 16131-16133 (1971)). At one point the article suggested (*id.* at 16132) that

> [m]ost civilian jobs with the U.S. military in Europe are occupied by local nationals (Europeans). Most of these jobs could be done, and probably done better, by American dependents * * *. If American soldiers and dependents had these jobs instead, it would bring many of the enlisted families out of poverty.

Senator Schweiker's response (*ibid.*)—"[j]ust a simple Executive order would change this"—indicates that he did not view local national hiring preferences established by international agreements as the evil to be remedied by Section 106. Rather, Senator Schweiker's introduction of Section 106 must have been aimed at employment preferences established by individual base commanders because, while an executive order would have sufficed to overrule a directive by an individual commander like General Phipps, it would not have relieved the United States of its obligations under any form of international agreement.

At another point, the newspaper article stated that (117 Cong. Rec. 16128 (1971) (remarks of Sen. Schweiker)) "[p]ortions of SOFA [the Status of Forces Agreement] could and should be changed to allow dependent wives to take many of the jobs now available solely to local nationals * * *." Senator Schweiker responded (*ibid.*):

> Mr. President, let me interject there that we have done some research and find that, in Germany particularly, that is not the case. Our commanding general who is head of the European Exchange System, Gen. Charles H. Phipps, in a memo of February 1971, issued this edict across Europe to all the stores and services in the exchange system:

> For the reasons outlined above, I desire that the European Exchange System elements in the months ahead emphasize recruitment of local nationals and sharply deemphasize the utilization of United States dependents or tourists.
>
> Here is an American general saying that when the GI's go to their canteen or service post exchange and spend their money, they do not even have the right to have their wives working there because we should give those jobs to German nationals.

Hence, it is clear that Senator Schweiker viewed as the problem not the United States' status of forces agreement with Germany, but rather the type of situation that could be created by a single officer's order made in contravention of existing military policy of hiring dependents whenever possible (see page 36, *supra*).

Moreover, the absence from Senator Schweiker's extended remarks (see, *e.g.*, 117 Cong. Rec. 14394-14397, 16120-16122 (1971)) of any references to local employment preferences at military bases outside of Germany also counsels against the court of appeals' narrow construction of the word "treaty" in Section 106. Specifically, Senator Schweiker never alluded to the bases in the Philippines or the hiring preference required by the BLA. This is not surprising, since Senator Schweiker's concern with service members' cost of living in Europe would have had no application to the Philippines, where the cost of living is far below that in Europe. Indeed, the committee reports' only mention of Section 106 is the statement that "[t]he purpose of this amendment is to correct a situation which exists *primarily on some American bases in Europe.*" S. Rep. No. 92-93, *supra*, at 23

(emphasis added); accord, H.R. Conf. Rep. No. 92-433, 92d Cong., 1st Sess. 31 (1971).

Instead of according the appropriate deference to the views of Senator Schweiker, the principal sponsor of Section 106 (see *Simpson* v. *United States*, 435 U.S. 6, 13 (1978)), the court of appeals relied almost entirely (Pet. App. 14a) on an isolated remark by Senator Hughes that wives of servicemen "are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located * * *" (117 Cong. Rec. 16126 (1971)). It is difficult to ascribe any weight to this ambiguous remark. As noted above (see page 34, *supra*), the Hughes-Schweiker floor amendment was concerned with limiting the extension of the draft from two years to one year and increasing military pay. Senator Hughes' particular focus was on the need for increased military pay (117 Cong. Rec. 16120 (1971) (remarks of Sen. Schweiker); *id.* at 16124-16126 (remarks of Sen. Hughes)). During the debates, this need for improved compensation was linked with the inability of service members' dependents to obtain employment in the local economies because of their tourist visa status. 117 Cong. Rec. 16126 (1971) (remarks of Sens. Cook and Hughes). Significantly, the statement of Senator Hughes relied on by the court of appeals immediately follows his observation (*ibid.*) that servicemen "in the lowest ranks cannot have their wives obtain anything but a tourist visa" and echoes Senator Cook's comments on the same point (*ibid.*):

> On my inquiry of the Defense Department, it was my understanding that there was an agreement, through the NATO organization, that those young wives, because they were there on tourist

visas, could not get a work permit under any circumstances.

Accordingly, it may be that Senator Hughes failed to appreciate that while work permit visas are required of United States dependents who work in the local economies of host nations, such visas are not required of United States citizens who are employed on United States military bases overseas. Therefore, his remarks about "agreements" may erroneously have referred to provisions concerning the visa status of American military dependents rather than to employment preference agreements such as the BLA.

In any event, Senator Hughes' brief statement, occurring as it does in a confused context and contradicting the clear understanding of the primary sponsor of Section 106, provides no basis for a finding of a "clear legislative intent" to abrogate obligations contained in more than a dozen binding international agreements to which the United States was a party. To the contrary, the legislative record supports the conclusion that Section 106 was intended to prevent future actions by individual Department of Defense commanders, and that the "treaty" exception was intended to ensure that obligations under binding international agreements would not be disturbed.

D. The Executive Has Consistently Interpreted the Word "Treaty" in Section 106 As Including All Binding International Agreements, And Congress Has Been Informed Of And Has Acquiesced In That Interpretation

Since the enactment of Section 106 in 1971, the United States has entered into at least five additional international agreements that contain some form of local national employment preferences but are not

in the form of Article II treaties.[24] Each of these agreements was submitted to Congress pursuant to the Case Act, 1 U.S.C. (Supp. III) 112b.[25] We are

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[24] See note 4, *supra*.

[25] The court of appeals relied (Pet. App. 16a-18a) on the fact that the same Congress that enacted Section 106 also passed the Case Act, 1 U.S.C. 112b, which, as originally enacted, required the Secretary of State to submit to Congress "the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter." But Congress' use of the word "treaty" in the Case Act is not controlling in this wholly different context.

First, it is hardly surprising that Congress would distinguish between Article II treaties and other international agreements in a statute requiring the submission of documents by the Executive branch, because submission of the former category of documents to the Senate was already required by Article II, Section 2 of the Constitution. Moreover, while the court below admitted (Pet. App. 17a) that "the general subject matter treated in the two enactments is not the same," it drew on what it thought "may have been" "a similar concern" of both statutes, that is, a congressional desire to check presidential power (*ibid.*). Such a concern does not appear to have played a part in the enactment of the Case Act (see 118 Cong. Rec. 4090-4091 (1972) (remarks of Sen. Case); *id.* at 4093 (remarks of Sen. Bentsen) ("[w]e do not want to tie the President's hands in his efforts to engage in foreign policymaking")), which, after all, only requires notice to Congress of international agreements *after* they have been concluded. In any event, there is no basis for assuming that a desire to check presidential power was the motivation for Section 106. It is unreasonable to believe that Congress sought to control the Executive branch by requiring only that one particular issue usually addressed in executive agreements must be dealt with in the Article II treaty format.

Indeed, during the past decade several legislative proposals were introduced that would have restricted the ability of the

advised that no member of Congress has expressed concern to the Department of State that any of these agreements runs afoul of Section 106.

Other post-enactment legislative history confirms that Congress is aware that the inclusion of hiring preferences in international agreements that have not been submitted to the Senate has continued since the passage of Section 106. In considering subsequent Department of Defense appropriations requests, Congress has explicitly recognized (H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 80 (1978)) that "[f]oreign nationals are employed either directly or indirectly in virtually all countries where U.S. forces are deployed. The United States and the host country have administrative agreements (referred to as Status of Forces Agreements) which define and prescribe requirements that military departments are

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Executive branch to conclude non-Article II treaties, especially those related to the presence of United States forces overseas (for example, by requiring that such agreements be submitted to the Senate for its advice and consent or by providing that Congress could disapprove of such agreements by concurrent resolution). See, *e.g.*, S. 3475, 92d Cong., 2d Sess. (1972); S. 3637, 92d Cong., 2d Sess. (1972); H.R. 1268, 94th Cong., 1st Sess. (1975); H.R. 1273, 94th Cong., 1st Sess. (1975); H.R. 5489, 94th Cong., 1st Sess. (1975); H.R. 4438, 94th Cong., 1st Sess. (1975). See generally E. McDowell, *Digest of United States Practice In International Law 1976*, at 242-263 (1977). None of these restrictive provisions was enacted. As this Court stated in *Dames & Moore* v. *Regan*, *supra*, slip op. 27, "[i]t is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that every purpose *sub silentio* through [Section 106]."

obligated to observe in satisfying their local civilian labor needs." See also *Department of Defense Authorization for Appropriation for Fiscal Year 1979: Hearings on S. 2571 Before the Senate Comm. on Armed Services*, 95th Cong., 2d Sess. 2369-2371 (1978); *Congressional Oversight of Executive Agreements: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 248, 256-258 (1972) (statement of John R. Stevenson, Legal Adviser, Department of State); Reply Memorandum for the Petitioners 1a-7a; A. 207-211. Congress, however, has not chosen to alter this consistent administrative construction.[26] Such a " 'long-continued practice, known to and acquiesced in by Congress, * * * raise[s] a presumption that the [action] has been [taken] in pursuance of its consent . . . .' " *Dames & Moore* v. *Regan*, *supra*, slip op. 28, quoting *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915); accord, *Haig* v. *Agee*, *supra*, slip op. 9-10.

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[26] The court of appeals correctly noted (Pet. App. 15a n.30) that its view coincided with an interpretation of Section 106 that had been rendered by the General Accounting Office (see A. 203-206). We dispute, however, the court's similar, unqualified characterization (Pet. App. 15a n.30) of the Department of State's pre-1977 construction of Section 106 (see A. 220-225). In any event, the Department of State and the Department of Defense, the agencies most closely involved in the negotiation and implementation of international agreements concerning rights to military bases abroad, have made clear their interpretation of Section 106, both through the conclusion of several post-Section 106 international agreements (see note 4, *supra*) and in their written communications (see Reply Memorandum for the Petitioners 1a-7a; A. 207-219).

In sum, Congress expressly authorized the President to acquire, withhold and retain military bases in the Philippines "by such means as he finds appropriate" (22 U.S.C. 1392). As we have shown, Congress, since the enactment of Section 106, has acquiesced in the Executive's use of the means found appropriate in the case of the Philippines—local national hiring preferences contained in non-Article II treaties—in the context of agreements with other foreign nations. In these circumstances, and particularly in the absence of any evidence of a clear legislative intent to abrogate provisions of existing international agreements granting the United States significant military advantages, no such intent should be attributed to Congress. Rather, the "treaty" exception in Section 106 should be construed to encompass all binding international agreements to which the United States is a party, including the BLA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, *et al.*, *Petitioners*,

v.

ANTHONY M. ROSSI, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTION PRESENTED

Whether the word "treaty" in Section 106 of Pub. L. No. 92-129, which prohibits employment discrimination against United States citizens on military bases overseas unless permitted by "treaty," encompasses all international agreements concluded by the President with the host country or is limited to treaties consented to by the Senate pursuant to article II, section 2 of the United States Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the parties to this case are petitioner John F. Lehman, Jr., Secretary of the Navy, and respondents Cindy L. Perry, Malinda Frierson, Fred E. Bumgarner, Camela Banks, Edna Horvath, Paul Chapman, Kenneth E. Oyler, James Vinson, A. H. Schilot, George Marshall, Herb Allen, Robert Wolbert, Rex W. Thomas, Elizabeth Taylor, Susan Keyes, Carroll E. Mason, Carlos F. Garcia, Clarence Labak, Richard Anderson, Beulah M. Jones, Pilar Galvin, Beverly Walker Pratt, Harold E. Shrader, Doris M. Chaisson, Karen S. Knapp, Patricia Procter, Gertrude A. Stevens, Arthur P. Fernandez, and Cynthia A. Roybal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1924

CASPAR W. WEINBERGER, *et al.*, *Petitioners*,

v.

ANTHONY M. ROSSI, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals Appendix to Petition ("Pet. App." 1a-19a) is reported at 642 F.2d 553 (D.C. Cir. 1980). The opinion of the District Court (Pet. App. 20a-39a) is reported at 467 F.Supp. 960 (D.D.C. 1979). The decision of the administrative agency on the discrimination complaint by respondents (Pet. App. 41a-45a) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 46a-47a) was entered on September 15, 1980, and a petition for rehearing was denied on December 18, 1980 (Pet. App. 48a-49a). On March 13, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 16, 1981, and the petition was filed on May 15, 1981. The Court granted the petition on October 5, 1981. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. § 7201 note (Supp.III), provides:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

STATEMENT

1. Each of the plaintiffs in this case is a U.S. citizen residing in the Philippines who sought to obtain or to keep a civilian job at U.S. military installations in the Philippines. Many plaintiffs applied for jobs and were summarily rejected because the jobs were reserved for local nationals. Other plaintiffs were deterred from applying for such jobs reserved for local nationals. Four plaintiffs, Rossi, Bumgarner, Frierson and Perry, actually held jobs at the Subic Bay Naval installation and were replaced by Filipinos when their jobs were converted.

2. Cross motions for summary judgment in the District Court led to the dismissal of Respondents' discrimination suit on the grounds that Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. § 7201 note (Supp. III) (referred to as the "Hughes-Schweiker Amendment") authorized employment discrimination against U.S. citizens and that it superseded Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* Pet. App. 20a-39a. [1] Respondents (plaintiffs in the District Court) appealed the

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[1] The Complaint, included in the Court of Appeals Joint Appendix [hereinafter cited to as "A."], alleges violations of the Hughes-Schweiker Amendment as well as of Title VII. A. 1-11. Respondents relied upon language in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 92 (1973) that "Title VII prohibits discrimination on the basis of citizenship *whenever it has the purpose or effect* of discriminating on the basis of national origin." (emph-

grant of summary judgment in favor of the United States Government. The Court of Appeals ruled that the term "treaty" in the Hughes-Schweiker Amendment should be construed to exclude executive agreements due to the plain meaning of the term "treaty" and the evidence of Congressional intent to abrogate inconsistent executive agreements. Pet. App. 1a-19a. [2] Respondents adopt the procedural history of the case stated by the Government. Pet. Brief at 7-11.

3. The question before this Court is whether the term "treaty" as used in this statutory prohibition of discrimination against U.S. citizens should be construed to include any "other international agreements." At the time the Hughes-Schweiker Amendment was enacted by Congress, twelve agreements provided for preferential treatment of local nationals in employment at U.S. overseas facilities. Pet. App. 13a. In addition, the NATO Status of Forces Agreement, 4 U.S.T. 1792, 1810, T.I.A.S. No. 2846 ("NATO SOFA") was construed to apply German labor laws (which the German Government contended required such preferences) to U.S. facilities in the Federal Republic of Germany. Pet. Brief at 6-7 n.5. [3] There were no instances

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asis added). *See* A. 29. The Department of the Navy (A. 230-232) rejected the administrative charge of discrimination since "the matters complained of in the instant class complaint are not under the control of the Department of the Navy [due to the Base Labor Agreement, Article I, para. 1]." A. 231. The District Court, in addition to ruling with the Government on the Hughes-Schweiker Amendment issue, held that "[t]he specific provision that the Department of Defense may discriminate on the basis of citizenship if provided by treaty therefore controls over the general provisions of Title VII." Appendix to Petition for Writ of Certiorari 37a-38a [hereinafter cited as Pet. App.]. *Cf. Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir.), *cert. granted*, Nos. 81-24 & 80-2070, 50 U.S.L.W. 3351 (Nov. 2, 1981) (raising the issue whether the United States-Japan Treaty of Friendship, Commerce and Navigation, 4 U.S.T. 2063, allowing Japanese companies operating in the United States to hire certain personnel "of their choice," should be given effect so as to limit the prohibition of Title VII against discrimination on the basis of national origin).

[2] The Court of Appeals did not address the Title VII issue due to its ruling on the Hughes-Schweiker question. Pet. App. 19a n.36, 642 F.2d at 561 n.36.

then in effect in which local national preferences existed outside the framework of a diplomatic arrangement of some sort. Pet. App. 12a-13a.

4. Some form of diplomatic arrangements for preferential treatment of local nationals still exists in several countries besides the Philippines. Pet. Brief at 5-6 nn. 3 & 4.

5. Congress has recently called upon the Executive Branch to "take every possible action including renegotiation of existing agreements if necessary in order to enhance the employment opportunities for U.S. citizens living in overseas areas." H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 CONG. REC. H9575 (daily ed. Dec. 15, 1981).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the issue of whether the term "treaty" used in a statute prohibiting discrimination against U.S. citizens in overseas employment at U.S. bases can be loosely defined to include all forms of international agreement. The issue is simply one of statutory construction: did Congress intend narrowly to grant exceptions to this prohibition?

The Government concedes before this Court that the Executive Branch has acted in this area under a grant of authority from Congress. Petitioner's Brief at 27 n.16. Nowhere has the Government challenged the authority of Congress to enact legislation concerning the terms and conditions of employment at U.S. overseas bases. Such legislation obviously has domestic impact, contrary to Petitioners' unsupported assertions. Pet. Brief at 23.

The parties agree that Congress has exercised its constitutional authority, but differ over the meaning of the statute so enacted. The Court of Appeals unanimously adopted the view that the term "treaty" was used in its normal sense and was intended to abrogate inconsis-

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[3] However, the highest German labor court has recently concluded that Germans need not receive such a preference under German law. der Sechste Senat des Bundesarbeitsgerichts, BArbGE File No. 6 ABR 74/78 (July 23, 1981).

tent executive agreements which provided for discrimination against U.S. citizens. This Court should affirm Judge Wilkey's opinion written for a unanimous panel of the Court of Appeals.

The intent and purpose of Congress in enacting the Hughes-Schweiker Amendment was simple and clear. It was to provide "that the Department of Defense cannot discriminate against American citizens or their dependents in employment on military bases." S. REP. NO. 92-93, 92d Cong., 1st Sess. 23 (1971). The co-sponsor of the legislation referred to the classification of jobs as "local national jobs" which could not be filled by U.S. citizens and dependents "because of their classification." 117 CONG. REC. 16132 (1971) (remarks of Senator Schweiker quoting an article in *Stars & Stripes*). The other co-sponsor noted that:

> [wives of enlisted personnel] are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located,* and are forced to live in poverty. 117 CONG. REC. 16126 (1971) (remarks of Senator Hughes) (emphasis added).

The sole means of classifying jobs as "local national" was at that time and remains executive agreements such as those referred to by Senator Hughes. The Government's explanation of this legislative history is circular and would defeat the Congressional purpose expressed at the time of passage.

The term "treaty" has consistently been used in the constitutional sense by the 92d Congress in the Case Act, 1 U.S.C. § 112b, and other measures; by Congress in numerous other statutes; by the administrative agencies (Department of State and Defense) in this and other contexts; and by international experts in this field. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 302 (Tent. Draft April 1, 1980). The Court of Appeals correctly noted that "under United States law, 'treaties' normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status." Pet. App. 7a, 692 F.2d at 557.

It is not disputed here that Congress has the authority to direct "whether United States citizens would be discriminated against in the employment of civilian personnel on overseas military bases." Pet.

App. 18a, 642 F.2d at 561. *See Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948), *rehearing denied*, 336 U.S. 928 (1949); Pet. Brief at 27 n.16. It is similarly clear that when Congress exercises its legislative prerogative inconsistent executive agreements are abrogated even if such a result is inadvertent. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1871) and cases cited herein. The State Department has noted consistently that it is "perfectly clear that, in an area of shared Presidential and Congressional powers, subsequent legislation would override an executive agreement. . . ." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 288-89 (1972) (Statement of John R. Stevenson, Legal Advisor, Dep't of State).

Foreign policy allegations made by the Government before this Court are thus irrelevant, since the Government concedes Congressional authority to act in this area. Moreover, not only is there an absence of a factual basis in the record for such allegations, but after extensive oversight, Congress seems to have rejected these same arguments. *See* H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 CONG. REC. H9575 (daily ed. Dec. 15, 1981). In raising these allegations, the Executive Branch seems to be attempting to draw this Court into a debate it has repeatedly lost in Congress. Finally, any arrangements deemed critical to national security could continue under the Court of Appeals decision as long as they were approved by the Senate.

Congress enacted the Hughes-Schweiker Amendment "to correct a situation [in which] . . . dependents are effectively prevented from obtaining employment [at U.S. bases overseas]." H.R. REP. NO. 92-433, 92d Cong., 1st Sess. 31 (1971). Since 1971, the situation has never been corrected, despite the intent and subsequent pronouncements of Congress, the opinion of the U.S. General Accounting Office that these agreements were unlawful and the opinion of the State Department until 1977 that these arrangements contravened the intent of the Hughes-Schweiker Amendment. This Court can finally correct the situation. A ruling which affirms the Court of Appeals decision would have major beneficial effects on thousands of military families who have endured the increasing hardship of overseas tours,

unable to add to their family income by employment at these U.S. facilities. Such a ruling would finally vindicate the policy of Congress announced ten years ago and reiterated in December of 1981.

ARGUMENT

I. Congressional Purpose Can Only Be Realized By Construing "Treaty" In The Sense That The Term Is Used In The United States Constitution.

The Court of Appeals for the District of Columbia Circuit concluded below that "*consistent with this purpose* [of eliminating discrimination against American citizens], *Congress could only have intended the 'treaty' exception to include an agreement made by the President with the advice and consent of two-thirds of the Senate.*"[4] Support for this conclusion comes from the Congressional purpose expressed at the time of enactment of Section 106, from the contemporary expression of legislative intent, from the use of "treaty" in contemporaneous legislation, and from subsequent declarations of Congressional policy. Only by constructing an elaborate and pretextual chain of reasoning has the Government devised support for a contrary interpretation. Such an interpretation, if adopted by the Court, would frustrate the clearly expressed policy of Congress to eliminate discrimination against American citizens.

A. *Expansion Of The Term "Treaty" To Include Any International Agreement Would Frustrate The Purpose Of The Hughes-Schweiker Amendment.*

The doctrine that "courts will construe the details of an act in conformity with its dominating general purpose" has been clearly established by this Court and is a central canon of statutory construction. *SEC* v. *Joiner Corps*, 320 U.S. 344, 350-51 (1943).[5] Simply

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[4] Pet. App. 15a, 642 F.2d at 560 (emphasis in original).

[5] *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410-13 (1971); *Boys Market, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250 (1970); *United States* v. *Speers*, 382 U.S. 266,

put, "[s]tatutes should be so construed as to carry out the legislative purpose." *St. Louis and O'Fallon Railway Co.* v. *United States*, 279 U.S. 461, 484 (1929). The legislative purpose of the Hughes-Schweiker Amendment, as stated in the Senate Report, is quite clear: to establish that "the Department of Defense cannot discriminate against American citizens or their dependents in employment on military bases."[6] The Conference Committee Report echoed this general remedial purpose:

> The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, *where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men* whose dependents are effectively prevented from obtaining employment. The House accepts the Senate provision.[7]

While there is no doubt as to the situation which Congress sought to correct, there is also no doubt that that situation — the preferential hiring of local nationals at the expense of American citizens — existed at the time of enactment of this provision by virtue of executive agreements between the United States and foreign

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271-75 (1965), *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480, 488 (1957); *National Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). "In the absence of an unmistakable directive, the Court has refused to construe legislation aimed to protect a certain class in a fashion that will run counter to the goals Congress clearly intended to effectuate." *NLRB* v. *Plasterers' Union Local*, 404 U.S. 116, 130 (1971).

[6] S. REP. NO. 92-93, 92d Cong., 1st Sess. 23 (1971). An "unmistakable" purpose articulated in congressional reports is "of controlling importance in construing . . . statutory changes. *Commissioner* v. *Bilder*, 369 U.S. 499, 503-04 (1962). *See, e.g., Flora* v. *United States*, 357 U.S. 63, 73-75 (1958); *Benz* v. *Compania Naveria Hidalgo, S.A.*, 353 U.S. 138, 143-44 (1957); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 292 (1957); *United States* v. *Flores*, 289 U.S. 137, 157 (1933); *William Cramp & Sons Ship & Engine Bldg. Co.* v. *International Curtis Marine Turbine Co.*, 246 U.S. 28, 37-39 (1918); *Binns* v. *United States*, 194 U.S. 486, 495 (1904).

[7] H.R. REP. NO. 92-433, 92d Cong., 1st Sess. 31 (1971) (emphasis added).

governments.[8] If Section 106 is construed so as to include executive agreements within the "treaty" exception of the provision, then clearly the provision would be rendered a nullity.[9] The Government, however, proposes just this result by suggesting that the purpose of the Hughes-Schweiker Amendment was simply "to prevent future actions by individual Department of Defense commanders. . . ."[10] The Court of Appeals rejected this argument for several reasons: (a) the legislative history contains reference to only a single incident of an individual commander encouraging the hiring of local nationals;[11]

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[8] The Court of Appeals noted that "twelve international agreements were in effect providing for preferential hiring of local nationals on United States military bases." Pet. App. 13a, 642 F.2d at 559. In addition, under the NATO Status of Forces Agreement, 4 U.S.T. 1792, 1810, T.I.A.S. No. 2846, "*the U.S. Forces have historically designated certain positions to be filled by local labor.*" Letter from Carl W. Clewlow, Deputy Asst. Sec. of Defense for Civilian Personnel Policy, to George H. Mahon, Chairman of House Comm. on Appropriations (April 23, 1978), included as Attachment One to Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, referenced at App. 93 n.11, (emphasis added). In 1971, the DOD policy then in effect called for limited hiring of dependents "consistent with status of forces agreements, country-to-country agreements and treaties. . . ." DOD Circular, March 6, 1961, cited in A.202. As of 1978, the United States Government objected to the German Government's interpretation of SOFA, Article IX, as requiring a preference for local nationals *(Id.)*. Contrary to the Government's position in its brief, at 7 n. 5, the highest German labor court ruled on July 23, 1981 that applicable German labor laws *did not require preferential treatment of German workers at U.S. facilities*. der Sechste Senat des Bundersarbeitsgerichts, BArbGE, File No. 6 ABR 74/78 (July 23, 1981).

[9] Such an interpretation would totally frustrate the purpose of Congress and violate the most basic tenets of statutory construction. *See* cases cited in note 5 *supra*.

[10] Brief of Petitioners at 40 [hereinafter cited as Pet. Brief]. *See also*, District Court decision, Pet. App. 32a, 467 F.Supp. at 967 n.4.

[11] Pet. App. 12a, 642 F.2d at 558-59. The incidence in question did *not* involve classification of jobs as exclusively "local national," a practice which had been occuring under an erroneous view of the NATO SOFA *not due* to individual commanders' action. *See* note 8 *supra*.

(b) that incident was represented to Congress as having been mooted by the actions of the Department of the Army designed to correct the commander's order;[12] and (c) all on-going discrimination against American citizens was being conducted under international agreements.[13] The Court of Appeals concluded "that [the Government's contention] is *a constrained and erroneous view of congressional intent*."[14] The overriding purpose of Congress was obviously to help to alleviate the hardship of overseas tours of U.S. military personnel by increasing the employment opportunities for military dependents insofar as those opportunities were under U.S. control.[15]

The construction of Section 106 urged upon the Court by the Government would exempt from the proscription against discrimination *every* case of discrimination occurring at the time the legislation was passed. As Judge Wilkey observed in the Court of Appeals opinion, under the Government's view, "the exception to the ban on

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[12] Pet. App. 12a, 642 F.2d at 559.

[13] *Id.* 13a, 642 F.2d at 559.

[14] *Id.* 12a, 642 F.2d at 559.

[15] Jobs in local foreign economies would require work visas, which had been unavailable to U.S. dependents and which could not be unilaterally obtained by the United States. 117 CONG. REC. 16126 (1971) (remarks of Senators Cook and Hughes). Congress recognized that many jobs on U.S. bases, supported by American funding, were classified as "local national" and directed its attention to the portion of the problem it could solve. 117 CONG. REC. 16132 (1971) (remarks of Senator Schweiker reading article into the record). It was the opening of these jobs that Congress sought to effectuate by enacting the bill.

Senator Schweiker felt that a "simple Executive order" could change this. *Id.* While the Government contends that this fails to show an intent to abrogate international agreements given their internationally binding effect, Pet. Brief at 37, the Government has asserted elsewhere that "the President [even] has broad constitutional authority to terminate the Nation's treaty obligations, without seeking approval or acquiescence from Congress." Brief of Respondents in Opposition at 8, *Goldwater* v. *Carter*, 444 U.S. 996 (1979). (The Government there referred to "treaty" in its normal constitutional sense.)

discrimination virtually would engulf the general rule." [16] The Government is asking the Court to breach the Court's own admonition that "respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose." *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). *See Dalia* v. *United States*, 441 U.S. 238, 254 (1979). [17]

To alleviate the condition of hardship of U.S. citizens and dependents overseas, the term "treaty" must be viewed in its constitutional sense; otherwise, all of the practices affirmatively condemned by Congress will be allowed to continue without redress.

B. *By Enacting The Hughes-Schweiker Amendment, Congress Specifically Intended To Abrogate Existing Executive Agreements.*

While the Court of Appeals found a clear expression of Congressional intent to abrogate inconsistent executive agreements (Pet. App. 15a), the Government's argument on Congressional intent is without substantial authority. The Government makes much of the notion that intent to abrogate international agreements should be "clearly expressed." [18] The Government does not, however, analyze any authority with respect to what this Court has considered a "clear expression" of such intent. [19] In fact, the evidence of legislative intent

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[16] Pet. App. 18a, 642 F.2d at 561. "[A] statutory exception should be strictly construed so that the exception does not devour the general policy which the law embodies." *State of Utah* v. *Kleppe*, 586 F.2d 756, 769 (10th Cir. 1978).

[17] As this Court has noted elsewhere, "[w]e do not believe that Congress had in mind such a self-defeating scheme." *United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 451 (1946). *See USV Pharmaceutical Corp.* v. *Weinberger*, 412 U.S. 655, 665 (1973); *United States* v. *Shirey*, 359 U.S. 255, 260 (1959).

[18] Pet. Brief at 25-26.

[19] The seminal case for the Government's concept, *Cook* v. *United States*, 288 U.S. 102 (1933), involved a series of legislative and executive tariff actions. The first act passed in 1922 was followed by a treaty in 1924 and a re-enactment of the 1922 act in 1930. *Id.* at 109-112. This Court held that the treaty *superseded* the 1922 act (*Id.* 118-119) although the treaty did not even

held sufficient by this Court to negate even *treaty* obligations has been a far less clear than that which is available in this case.[20] The Government also misconstrues the relative weight to be given to statutes and executive agreements. A noted commentator states: "that the executive agreement must yield to an act of Congress is the uniform practice."[21] The Department of State's Legal Advisor has concurred that subsequent legislation may override an executive agreement.[22] The Government's contention that the same rule gov-

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refer to the act and the Government argued there that it did not repeal the act. This Court went on to hold that re-enactment of the provisions in 1930 did not restore the earlier rule without an expression of clear intent. In *Moser* v. *United States*, 341 U.S. 41, 45-46 (1951), this Court simply held that the treaty and statute involved could both be given effect without violence to the treaty obligations, finding that Congress could bar from obtaining U.S. citizenship Swiss citizens who claimed a draft exemption under a treaty providing for same. *Id.* at 45. *Accord, Clark* v. *Allen*, 331 U.S. 503, 510-11 (1947) (not only finding compatibility between the treaty in question and the statute, but noting a "tacit recognition" of the treaty's subject matter by the statute); *United States* v. *Payne*, 264 U.S. 446, 447-449 (1924) (harmonizing a general statutory provision with a specific Indian treaty by holding that statutory allotments of land for "agricultural or grazing purposes" included timbered land granted under a treaty because the statute referred to payments "to clear" land for cultivation); *Chew Heong* v. *United States*, 112 U.S. 536, 553 (1884) (finding "evidence of the most cogent nature of the intention of Congress not to disregard that treaty" within the legislation itself).

[20] *See* note 97 *infra* and accompanying text.

[21] Brochard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616, 623 (1945).

[22] It is "perfectly clear that, in an area of shared Presidential and Congressional powers, subsequent legislation would override an executive agreement." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 288-89 (1972) (statement of John R. Stevenson, Legal Advisor, Dep't of State) [hereinafter cited as Stevenson Statement]. *Accord*, A. Rovine, (Assistant Legal Advisor for Treaty Affairs, Dep't of State), *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 421 (1977). In the case of a treaty and a statute, "[s]ince both are the work of Congress there is less doctrinal difficulty in insisting that the later repeals the earlier. . . ." HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 163 (1975).

erning "repeals by implication" of statutes should apply to executive agreements is also without any substantive authority and is inapplicable here. [23]

In any event, the legislative history contains unmistakable evidence of the "clear expression" of intent to abrogate these agreements. Senator Schweiker, a co-sponsor of the Senate bill, read a lengthy article from the military publication *Stars & Stripes* into the record which clearly identified the problem to be corrected and leaves no doubt as to its cause:

> Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. *These jobs are classified as local national jobs and American dependents cannot fill the jobs because of their classification.* [24]

In addition, Congress specifically referred to executive agreements as the source of the problem to be corrected. Senator Hughes, the other co-sponsor of the bill, noted during the Senate floor debate on passage of the measure:

> [Dependents of enlisted personnel] are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located,* and are forced to live in poverty. [25]

Judge Wilkey and a unanimous Court of Appeals found this statement to be an unmistakable indication that Congress intended to abrogate those portions of the existing executive agreements providing for preferential hiring of local nationals. [26] Since the only system for

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[23] Pet. Brief at 26-27 & n.16.

[24] 117 CONG. REC. 16132 (1971) (emphasis added).

[25] 117 CONG. REC. 16126 (1971).

[26] Pet. App. 14a, 642 F.2d at 560. Statements of the sponsors of legislation should be given great weight in ascertaining the intent of Congress. *Pipefitters Local 562* v. *United States*, 407 U.S. 385, 409 (1972); *NLRB* v. *Fruit & Vegetable Packers and Warehousemen Local 760*, 377 U.S. 58, 66 (1964); *Gold Kist, Inc.* v. *United States*, 339 F. Supp. 1249, 1253 (N.D. Ga. 1971) (three judge court), *aff'd*, 409 U.S. 808 (1972). Although the references to international agreements in the legislative history are not extensive (Pet. App. 14a), they are "the final and only word on the subject." *Gold Kist, Inc.* v. *United States*, 339 F. Supp. at 1253. *See also City of New York* v.

classification of jobs as "local national" occurred under the various executive agreements, it is inconceivable that Senator Schweiker could have been referring to anything else.[27] The article read into the record by Senator Schweiker argued that "[p]ortions of SOFA could and should be changed to allow dependent wives to take many of the jobs now available solely to local nationals. . . ."[28]

The Government's principal rebuttal to the reasoning of the Court of Appeals is completely inapposite:

> it may be that Senator Hughes failed to appreciate that while work permit visas are required of United States dependents who work in the local economies of host nations, such visas are not required of United States citizens who are employed on United States military bases overseas. Therefore, his remarks about "agreements" may erroneously have referred to provisions concerning the visa status of American military dependents rather than to employment preference agreements such as the BLA.[29]

The Government hypothesizes that Senator Hughes was referring to agreements concerning visas and then goes on to point out that

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Train, 161 U.S. App. D.C. 114, 494 F.2d 1033, 1039 (1974), *aff'd*, 420 U.S. 35 (1975) (relying on selected comments by sponsors in a 1700 page legislative history).

[27] The memorandum by General Phipps, 117 CONG. REC. 14395-97 (1971), was directed solely at slowing down *recruitment* of U.S. dependents and tourists. *Id.* at 14395. The only *classification* of jobs as local national was occurring under an erroneous interpretation of SOFA or under other agreements such as the BLA. *See* note 8 *supra*.

[28] 117 CONG REC. 16128 (1971). The Government cites Senator Schweiker's interjection, after he read this passage, "that is not the case" for the proposition that the statement cited in the article was incorrect. Pet. Brief at 37. In fact, the interjection was to the effect that *the greater utilization of dependents called for by the article was not occurring* and was even being frustrated further by individual commanders. It was entirely accurate to say that SOFA was causing discrimination against American citizens, (*see* note 8 *supra)* and to ascribe some faulty understanding of this fact to Senator Schweiker would indeed be "disingenuous." *See Nardone* v. *United States*, 308 U.S. 338, 341 (1939); note 8 *supra*.

[29] Pet. Brief at 40.

civilian employment on U.S. bases is not affected by visas. This circular logic needlessly confuses the Court's consideration of the legislative history and clearly ignores the central conclusion to be gained from the record: *preferential hiring has existed as a result of the classification of certain base jobs as "local national" under executive agreements. Congress referred to such classifications and agreements in legislation prohibiting discrimination against American citizens.*

C. *Congress Used The Term "Treaty" In The Same Sense As In Other Contemporaneous Legislation.*

Implicit in the Government's contention that "treaty" in Section 106 should include executive agreements is the conclusion that Congress did not appreciate the difference between "treaty" and "executive agreement" and was unable to articulate the crucial distinction between the two. Contemporaneous expressions by the very Congress that enacted Section 106 reveal the Government's position to be untenable.

The Court of Appeals noted below that:

> legislation enacted contemporaneously with Section 106 supports our conclusion that Congress intended a clear distinction between treaties requiring the ratification of the Senate and other forms of international agreements. [30]

This Court has observed that "a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1971). The use of a word by Congress in another statute during the same period significantly "aids in ascertaining the meaning of the words as used in their contemporary setting." *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940).

In addition, the general context in which a piece of legislation is passed — in terms of the overall sense of the Congress — is also of great value in interpreting legislation. As this Court stated in *Standard Oil* v. *United States*, 221 U.S. 1, 59 (1911),

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[30] Pet. App. 16a, 642 F.2d at 560.

> [W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary. [31]

The context in which Congress viewed discrimination against U.S. citizens pursuant to executive agreements in the early 1970s was one of marked tension between the Executive and Legislative Branches. One writer observed:

> The past few years have witnessed an intense and profoundly important debate between the Congress and the executive branch on the subject of international executive agreements. Separation of power issues have abounded as the Congress, in a mood strongly reminiscent of the Bricker Amendment conflict of the 1950's, has attempted to gain a greater measure of control over the executive branch capacity to conclude international agreements. [32]

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[31] *Accord, Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 759-61 (1980) (holding "costs" as used in 28 U.S.C. § 1927 (1976) limited to contemporaneous view of "costs" in 28 U.S.C. § 1920 (1976 & Supp. II 1978)); *Agosto* v. *Immigration and Naturalization Service*, 436 U.S. 748, 754 (1978) (holding that 8 U.S.C. § 1105a (5)(1976) incorporated Fed. standard of "genuine issue of material fact"); *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978) (holding that the word "legal" in 29 U.S.C. § 626(b)(1976) incorporated a term of art entitling plaintiff to trial by jury); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words will be interpreted as taking their ordinary *contemporary*, common meaning") (emphasis added); *Gilbert* v. *United States*, 370 U.S. 650, 655-57 (1962) (holding that 18 U.S.C. § 495 uses the term "forges" in the common law sense established in this country, not in a broader sense originally expounded by the English Parliament).

[32] Rovine, *supra* note 22, at 397. *See* Murphy, *Treaties and International Agreements Other Than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives and the Senate*, 23 KAN. L. REV. 221 (1975). In 1970, Senator Fulbright referred to the "shabby use of the treaty making process" in reporting on his committee's work. 116 CONG. REC. 44016 (1970). *See, e.g.*, National Commitments Resolution, S.85, 91st Cong., 2d Sess., 115 CONG. REC. 17245 (1969) (referring to "affirmative action . . . by means of a treaty, statute, or government resolution of both Houses of Congress").

This debate focused particularly on the use of executive agreements in lieu of treaties:

> The viewpoint of the congressional sponsors of the measures, as expressed in the bills and in Congressional hearings, has been that the executive branch has wrongfully abridged the role of the Congress by concluding, in the place of treaties or other congressionally approved agreements, international executive agreements which, in the majority of cases, are not submitted to Congress for approval. [33]

The 92d Congress enacted legislation aimed at rectifying this circumvention of Congressional involvement in international affairs. The Case Act, 1 U.S.C. § 112b (1976), [34] expressed a major concern of the Congress over the use of executive agreements in lieu of treaties. The House Report on the bill noted that "Congress has not always been kept adequately informed about the international executive agreements entered into by the President. . . ." [35] The Case Act required the Executive Branch to "transmit to the Congress the text of any international agreement. . ., *other than a treaty*, to which the United States is a party. . . ." 1 U.S.C. § 112b (emphasis added).

Thus, the passage of the Case Act demonstrates beyond question that the 92d Congress was fully aware that the limited scope of the term "treaty" did not and does not encompass other international agreements and that the 92d Congress intended, as a general matter,

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[33] Rovine, *supra* note 22 at 398. Senator Ervin, for instance, observed in 1972: "I think executive agreements too often are used to circumvent the treaty making process, and they constitute in legal effect, a usurpation of the legislative power of Congress." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers, of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 47 (1972). *See also* Testimony of Prof. Alexander Bickel, Yale University Law School, before the Senate Comm. on Foreign Relations, *quoted in* S. REP. NO. 92-591, 92d Cong., 2d Sess. 2 (1972).

[34] Act of Aug. 22, 1972, Pub. L. No. 92-403, § 1, 86 Stat. 619, as amended.

[35] H.R. REP NO. 92-1301, 92d Cong., 2d Sess. 2 (1972). *See* House debate on passage, 118 CONG. REC. 28085-87 (1972).

to enact legislation which would effectively regain ground that had previously been unwittingly rendered to the Executive.

The State Department originally relied upon passage of the Case Act by the 92d Congress to support the view that the Hughes-Schweider Amendment was limited to treaties approved by the Senate. In 1975, the State Department noted:

> In the key and most recently enacted statute bearing on this subject . . . the Congress clearly marks the distinction between treaty and other international agreements. . . .[36]

The U.S. General Accounting Office has adopted this view as well.[37] The Court of Appeals below agreed that the Case Act's distinction between treaties and other international agreements should be given serious consideration in construing the meaning of Section 106:

> Although the general subject matter treated in the two enactments is not the same, Congress used precisely the same word in both, suggesting at least that if Congress had intended a more expansive scope for the exception to the ban on discrimination in section 106, it easily could have chosen the term "international agreement" rather than the word "treaty." Moreover we think a similar concern may have been present in both statutes. As a check on the President's power, Congress, in the Case Act, sought to ensure that the legislative branch received timely notice of all international agreements. By enacting section 106, we think that Congress also wanted to exercise some control over whether United States citizens would be discriminated against in the employment of civilian personnel on overseas military bases. We recognize that the usage in contemporaneous legislation is not dispositive in this case; still, we think it weighs in favor of the view that Congress also intended the term "treaty" in section 106 to mean an agreement made by the President with the advice and consent of two-thirds of the Senate.[38]

The contemporaneous distinction between treaties and other international agreements does not end with the passage of the Case Act. Senate Resolution 214 expressed the intent of the Senate of the 92d

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[36] A. 223.

[37] A. 205.

[38] Pet. App. 17a-18a, 642 F. 2d at 561 (footnotes omitted).

Congress that then-pending agreements with Portugal and Bahrain for "military bases and foreign assistance should be submitted as a treaty to the Senate for advice and consent." [39] The rationale for this resolution is directly relevant to the question of whether the 92d Congress held executive agreements to be sacrosanct or, rather, to be within the reach of legislative review and modification: "the character of the agreements and their broad policy implications are too important to be left to unilateral action by the executive branch." [40] The distinction between treaties and other international agreements was at the heart of this rationale.

Senator Harry F. Byrd, Jr., whose testimony was quoted in the Senate Report on the resolution, noted:

> The issue, as I understand it, is where should the line be drawn as to whether agreements with foreign nations should be by executive agreement, which does not require Senate action, or by treaty which does not require Senate approval. [41]

The Senate's efforts to require the submission of pending military base agreements as treaties was "[a]n attempt to exert some check on the President's power. . . ." [42] At the same time that Congress was considering the Hughes-Schweiker Amendment, Professor Alexan-

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[39] 118 CONG. REC. 6870 (1972). An earlier resolution on the Spanish Bases Agreement of 1970 made a similar distinction. *Hearings on Spanish Bases Agreements Before the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. 54, 57 (1970).

[40] S. REP. No. 92-632, 92d Cong., 2d Sess. 1 (1972).

[41] *Id.* at 4.

[42] Court of Appeals decision, Pet. App. 17a n.35, 642 F.2d at 561 n.35. *See generally Hearings on S. Res. 214, Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. (1972). Senator Ervin noted in hearings during this period: "During the past few decades, the executive branch has found irresistable the temptation to dispose of what it considered routine matters through the shortest method of entering into executive agreements, rather than making formal treaties. . . ." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 3 (1972).

der M. Bickel testified that base agreements were in a "twilight zone" that:

> may be occupied by Congress at will; that is the significance of it. It exists, and independent Presidential power can exist within it, only by Congress leave, or because of the inertia of Congress. It is redefined or it vanishes whenever Congress chooses to act. [43]

The reassertion of Congressional authority by the 92d Congress focused in large measure on the re-establishment of the constitutional role of "treaties." Neither the Case Act nor Senate Resolution 214 specifically defined "treaty" because the Congress did not feel any need to reiterate the well-known meaning of the term. [44] It is clear, given the context, that in Section 106 the 92d Congress was using "treaty" in its narrow constitutional sense. There is no reason to believe that the term "treaty" would have been accorded a wholly different meaning without explanation in other legislative actions of the same Congress. [45] This is especially true where that unique meaning would delegate to the Executive Branch the unilateral discretion to grant exemptions from the Congressional policy of non-discrimination against American citizens in base employment.

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[43] *Transmittal of Executive Agreements to Congress: Hearings on S.596 Before the Senate Foreign Relations Comm.*, 92d Cong., 1st Sess. 27 (1971) (testimony of Prof. Alexander M. Bickel).

[44] *But see* Pet. Brief at 21. Words with a normal plain meaning or well-known terms of art are seldom defined by legislation. *See* section II *infra*. That the 92d Congress, which undisputedly used the term in the normal and Constitutional sense in the Case Act and Senate Resolution 214, would have silently departed from this meaning is the more unlikely contention.

[45] Justice Jackson once commented, "neither should we embark upon a course of making the same naked words mean one thing in one Act and something else in another." *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 399 (1948) (Jackson, J., dissenting).

D. *Subsequent Congressional Directives Have Reiterated The Call For Cessation Of Preferential Hiring Of Local Nationals*

When the Government suggests that Congress has acquiesced in an interpretation of the Hughes-Schweiker Amendment which essentially nullifies the statute's effect, [46] it does great violence to the actual record of Congressional pronouncements. The legislative materials cited by the Government fail to show acquiescence by silence or by any other action. [47] Moreover, the Government's materials omit several key Congressional actions which condemn the practice of preferential hiring of local nationals.

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[46] Pet. Brief at 40.

[47] Materials cited by the Government indicating Congressional awareness of preferential hiring since 1971 actually demonstrate that Congress has not acquiesced to the practice: Congress has "questioned" the practice since 1971 and has "resisted the exercise of presidential authority." *See Dames & Moore* v. *Regan*, 49 U.S.L.W. 4969, 4978 (1981). H.R. REP. No. 95-1398, cited by the Government, noted that: "Over the years, the Committee has been urging the Department of Defense to employ more DOD dependents in jobs currently held by foreign nationals when these positions become vacant." *Id.* at 80. The conclusion of the report was to "urge" DOD to continue converting foreign national positions. *Id.* at 81. The 1978 appropriations hearings in the Senate mentioned the use of local nationals in Korea (Pet. Brief at 43), but Korea is not listed by the Government as a country subject to such an agreement (Pet. Brief at 5-6 nn. 3&4.) Finally, Mr. Stevenson's testimony before Senator Ervin's subcommittee, cited by the Government at page 43 of the Brief, dealt solely with base agreements with Spain, Bahrain and the Azores, none of which involved preferential hiring of local nationals at the time of the hearings (1972). *See* Stevenson Statement, *supra* note 22, at 256. The testimony addressed the discretion of the Executive to conclude base agreements via the use of executive agreements in lieu of treaties. The Government consistently confuses this issue with the one presented by this case: did Congress direct the use of treaties as the sole means of imposing local national preferences? If anything, the 1972 hearings point to the acknowledged distinction between the two forms of international agreement.

Contrary to any purported silent acquiescence, the House Committee on Appropriations in 1977 made a lengthy statement [48] on preferential hiring of local nationals which referred to the 1971 statute, to the Philippines Base Labor Agreement and to the General Accounting Office opinion on the unlawfulness of the BLA, and concluded:

> The Committee believes that the Department of Defense should *review* all of the agreements and attempt to *renegotiate* those which provide little or no flexibility to the military service to

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[48] "In some countries the Department has entered into base labor agreements or has at the insistence of the Department of State provided preferential treatment for foreign national citizens. The General Accounting Office holds the legal opinion that the base labor agreements with the Philippines is in violation of a 1971 statute (Section 106 of Public Law 92-129) which prohibits discrimination in employment by the Department of Defense against United States citizens or dependents of members of the armed forces unless otherwise provided by treaty. The Department of Defense contends that the base labor agreement is a "treaty" within the meaning of that term as it is used in the 1971 statute, even though it has not been ratified by the United States Senate. The Department cites a 1912 Supreme Court Decision that indicated as a matter of statutory interpretation, the word "treaty" in a statute, unless there is legislative history to the contrary, includes "treaty" in the broad sense, to include executive agreements which do not have to be ratified by the Senate.

"Until recently the State Department held a position similar to GAO's but now agrees with the Department of Defense interpretation. There are no pending law suits to test the validity of DOD's interpretation at the present time.

"The situation in the Philippines is cited as an example of the problem. While it is quite clear that employing Philippine citizens is less costly than employing United States citizens in nearly all situations it does cause problems. For example, U.S. dependent children cannot be employed in their own teen clubs and other non-appropriated fund activities or hold part-time jobs of any kind. This causes morale problems.

"In another instance, one of the services has told the Committee that they would like to release a number of no-longer required employees in one particular country but the Department of Defense has been required to keep them on the payrolls. Also, many of the positions are designated (in the position descriptions) to be filled by a foreign national even though there is no reason for the special designation. When a job so designated becomes

> employ the type of labor which it believes to be lowest in cost, most efficient, or *necessary for the welfare and morale of its personnel*.[49]

The Committee also sought to be advised regularly on progress of this matter.[50] On April 23, 1978, the Deputy Assistant Secretary of Defense informed the Committee that "country-to-country agreements do not present a significant problem in obtaining flexibility desired."[51] Later, the Department of Defense took a position that the Base Labor Agreement for the Philippines would be reconsidered during then-pending base negotiations, and stated that "the finalized treaty" would be submitted to the Senate.[52] Again, it appears that while the Executive has sought to mislead or somehow appease Congress in order to induce Congressional acquiescence, that acquiescence has never been forthcoming.

The legislative history of the most recent military appropriations bill firmly reiterated the Congressional policy against preferential hiring of local nationals. The Conference Committee Report stated unequivocally:

> The DOD should take every possible action including renegotiation of existing agreements, if necessary, in order to enhance the

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available the personnel offices attempt to fill the position with a foreign national although no particular reason can be cited for this preferential treatment.

"The Committee believes that the Department of Defense should review all of these agreements and attempt to renegotiate those which provide little or no flexibility to the military service to employ the type of labor which it believes to be lowest in cost, most efficient, or necessary for the welfare and morale of its personnel.

"The Committee expects to be advised from time to time of progress in this area." H.R. REP. No. 95-68, 95th Cong., 1st Sess. 25 (1977).

[49] *Id.* (emphasis added).

[50] *Id.*

[51] Letter from Carl W. Clewlow, *supra* note 8. The basis for this misleading statement is unknown.

[52] Brief in Opposition to Petition for Writ of Certiorari, *Weinberger* v. *Rossi*, Appendix B, at 3a.

> employment opportunities for U.S. citizens living in overseas areas. [53]

Far from concurring in the Executive Branch's unilateral practice of discriminating against Americans overseas, Congress again expressed its policy of ending all such arrangements. [54]

The actions of the Appropriations Committee as expressions of Congressional policy should be viewed in the broader context of the struggle between the two branches. In efforts to defeat legislation which would provide an express legislative veto of executive agreements by either House of Congress, a State Department official noted the viability of existing means of Congressional participation:

> Clearly agreements within the competence of the Congress may be appropriately invalidated by a subsequent statute or by joint resolution. In addition, the power of the purse enables Congress to refuse funding for any executive agreement; this protection is very real since almost all significant agreements require funding. [55]

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[53] H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 CONG. REC. 9575 (daily ed. Dec. 15, 1981).

[54] The contrast to the facts in *Dames & Moore* v. *Regan*, 49 U.S.L.W. 4969 (1981) relied upon by the Government, is striking. In *Dames & Moore*, the authority of the executive branch to settle foreign claims of Americans was undisputed. This Court pointed to a statutory scheme designed to implement just such settlements (*Id.* at 4976), and to congressional pronouncements approving of and preserving the authority of the President. *Id. Compare* S. REP. NO. 97-71, 97th Cong., 1st Sess. 5 (1981) *with* H.R. REP. NO. 95-68, 95th Cong., 1st Sess. 25 (1977). In the case of preferential hiring of local nationals, it cannot be said, as it was in *Dames & Moore*, that there is "a systematic, unbroken executive practice, long pursued to the knowledge of Congress and *never before questioned*. . . ." *Id.* at 4978 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-11 (Frankfurter, J., concurring) (1952) (emphasis added)).

[55] Rovine, *supra* note 22, at 421. While Congress could simply refuse to appropriate funds for this purpose (*See United States* v. *Will*, 449 U.S. 200, 222 (1980) and H.R. 4995, 97th Cong., 1st Sess. (Dec. 4, 1981)), in this case it chose a less abrupt means of reiterating the policy of the Hughes-Schweiker Amendment. In effect a joint resolution, the amendment to the military appropriations bill for FY 1982 was a recognized method of disput-

In this case, Congress invalidated the existing agreements for domestic law purposes in 1971 [56] and has been since urging the Executive to renegotiate each of the international obligations involved. [57] While Congress has never retreated from or reconsidered the underlying prohibition of the practice, and the General Accounting Office and Court of Appeals have joined in this view, the Execu-

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ing the President's authority to continue the practice of local national preferential treatment. *But see* Rovine, *supra* note 22, at 421; Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 377 (1955).

[56] "[A treaty as well as an executive agreement] ceases to be binding domestically when a contrary statute is enacted." McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 346 (1945). While the Government attempts to characterize base hiring as having "no domestic impact," (Pet. Brief at 23) employment practices of the U.S. Government are obviously "domestic" in nature no matter where theyoccur. The domestic nature of a matter is coterminous with the power of Congress to legislate. HENKIN, *supra* note 22, at 179. *See Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 389-90 (1948), *rehearing denied*, 336 U.S. 928 (1949).

[57] The basic principle in this area has been described as follows:

> As good faith requires, when it becomes necessary or appropriate because of the enactment of contrary legislation to terminate an executive agreement . . . the traditional practice has been to resort to negotiation with the co-contractor State.

Mathews, *supra* note 55, at 348.

Congress has now repeatedly directed that such negotiations commence and has consistently been put off by false reports from the Executive Branch that all needed adjustments would be concluded shortly. *See* Brief in Opposition to Petition, Appendix A at 2a. The Department of the Navy similarly represented to Senator Jackson in 1977 that "the finalized treaty will require ratification by the Senate [and] . . . should resolve the question as to whether preferential employment of Filippinos is to continue." Letter from William Price to Senator Henry M. Jackson (April 1, 1977), referenced as Attachment Five to Plaintiff's Opposition to Motion for Partial Summary Judgment, A.98.

tive Branch has neither renegotiated these provisions nor submitted them to the Senate for approval.

This Court should consider this history of Executive Branch and Congressional interaction in the context of Justice Jackson's observation in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer:* "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[58]

II. The Normal And Plain Meaning Of The Term "Treaty" In The United States Refers Solely To Constitutionally Approved Agreements.

Where a statutory term has a settled and well-known meaning, this Court has presumed that Congress used the term according to that settled meaning. *See Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *Andrus* v. *Sierra Club*, 442 U.S. 347, 356 (1979); *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976); *Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975); *Bradley* v. *United States*, 410 U.S. 605, 609 (1973); *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 (1968). In this case, the term "treaty" has an established meaning in the United States, and this Court should:

> adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary.[59]

The distinction repeated throughout the Petitioner's Brief between article II treaties and so-called "non-article II treaties" is a wholly fictitious one. The legal and constitutional histories of this nation reveal no such distinction between categories of treaty.

Article II, section 2 of the Constitution of the United States provides that the President "shall have Power, by and with the Advice and Consent of the Senate to make treaties. . . ." A treaty in the United States is, by definition, a creation of article II, section 2,

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[58] 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[59] *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939).

clause 2 of the United States Constitution.[60] The Executive Branch has always maintained this traditional definition of "treaty" in its internal procedures as well as in its relations with Congress. In turn, Congress has consistently made a distinction between "treaties" and "other international agreements."[61] Finally, scholars and international law experts have widely acknowledged that the term "treaty" in the context of any dealings with our government has a clear meaning derived from the United States Constitution.[62] There are no "treaties" in the United States other than those concluded pursuant to article II.[63]

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[60] Where the normal meaning of the term "treaty" would frustrate the intent of Congress, the courts have occasionally opted for a more generic or loose view of the term. *See, e.g., B. Altman & Co.* v. *United States*, 224 U.S. 583, 600-01 (1912) ("the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal Court"); *Hughes Aircraft Co.* v. *United States*, 534 F.2d 889, 903 n.17 (Ct. Cl. 1976) (the reason for excluding treaties from the court's jurisdiction "is equally applicable to both forms of international compact"). See Court of Appeals opinion, Pet. App. 8a. *Cf. Four Packages of Cut Diamonds* v. *United States*, 256 F. 305, 306 (2d Cir. 1919), holding that postal "conventions are not treaties, because [they are] not made by and with the advice and consent of the Senate. . . ." *Accord, Williams* v. *Blount*, 314 F. Supp. 1356, 1362 (D.D.C. 1970).

[61] We observed above that the 92d Congress in particular used the term "treaty" in its normal constitutional sense. *See* pages 15-20 *supra*. Other examples are too numerous to fully catalogue. *See* note 75 *infra*.

[62] "For purposes of international law, there is no distinction between treaties and executive agreements. *This has no effect, however, on domestic law distinctions between the two forms. Those distinctions remain legally valid United States law.*" Rovine, *supra* note 22, at 402 (emphasis added). This distinction has been described as one of "international notoriety." McNair, The Law of Treaties 63 (1961).

[63] A departure from this normal meaning may occasionally be necessary in order to avoid an inequitable or nonsensical result. *See Altman*, 224 U.S. at 600-01; *Hughes Aircraft*, 534 F.2d at 903. The literal meaning of terms may be disregarded if there is brought "about an end completely at variance with the purpose of the statute." *United States* v. *Public Utils. Comm'n*, 345 U.S. 295, 315 (1953). *See also Helvering* v. *Hammel*, 311 U.S. 504, 510-11 (1941).

A. *Customary Usage Of "Treaty" By The Executive Branch Has Always Been Focused On Article II Agreements.*

In 1975, the State Department, referring to the Hughes-Schweiker Amendment in the specific context of the Base Labor Agreement at issue in this case, noted:

> The use of the term "treaty" in the United States is usually given a more defined meaning. As you are aware, Article II of the Constitution of the United States (Section 2, Clause 2) provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." Therefore, *in the United States the term "treaty" is normally used to indicate an international agreement that is to be or has been brought into force with respect to the United States by and with the advice and consent of the Senate* in conformity with Article II of the Constitution. An international agreement brought into force with respect to the United States in any other manner is usually referred to as an "executive agreement", *see* 14 Whiteman, Digest of International Law 1, or simply as an "international agreement," *see Restatement of the Foreign Relations Law of the United States, Second*, Section 117 *et seq.* (1965) and Henkin, *Foreign Affairs and the Constitution* 173 (1972).[44]

Even when the State Department modified its opinion on the lawfulness of the BLA in 1977, it continued to recognize the normal, accepted meaning of the term "treaty":

> In the United States, the term "treaty" has come to have a more specific meaning. Article II, Section 2, Clause 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . . ." *In the United States, the term "treaty" is therefore most frequently used to indicate an international agreement brought into force with respect to the United States in conformity with these provisions of Article II.* An international agreement brought into force with respect to the United States in any other manner is usually referred to as an "executive agreement." Thus, in this sense the

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[44] A.222 (emphasis added).

Base Labor Agreement is an executive agreement rather than a treaty. [65]

In fact, since 1953, the State Department has maintained written procedures for determining whether an agreement is to be concluded as a treaty or as an executive agreement. [66] These procedures, now contained in Circular No. 175, specify detailed criteria as to when executive agreements should be utilized in lieu of treaties. [67] It is inconceivable that this customary usage of treaty vis-a-vis executive agreement by the principal administrative agency charged with foreign relations was not well-known to the members of the 92d Congress. [68]

Even the Department of Defense has recognized the distinctive meanings of "treaties" and "agreements" in its procedures in effect in

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[65] A.208 (emphasis added).

[66] 11 FOREIGN AFFAIRS MANUAL 720-25 (1969). The original predecessor was Circular No. 25, May 15, 1953, superseded by Circular No. 175, Dec. 13, 1955. *See* Murphy, *supra* note 32, at 237.

[67] *See* Pet. Brief at 33 n.23. The Government's paraphrasing of Circular No. 175 omits the essential purposes of the circular, summarized by Executive Branch witnesses in 1972, to be "an acknowledgment that the types of executive agreements enumerated are to be distinguished from treaties" and to provide "guidance . . . [for] everyone as to what should be accomplished by treaty or what should be accomplished by executive agreement." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92nd Cong., 2d Sess. 326-27 (1972) (Testimony of Ralph Erickson, Asst. Attorney General, Office of Legal Counsel, Dep't of Justice).

[68] *See* note 67 *supra*. Indeed, the main role of Congress in this area has been to lament the Executive Branch's circumvention of the treaty process: "over the years the Executive Branch has deviated from the treaty formula and procedure, submitting instead executive agreements that truthfully should have been treaties." *Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs, House Comm. on International Relations*, 94th Cong., 2d Sess. 122 (1976) (Statement of Rep. Zablocki). The Government seems to respond more to the merits of this Congressional criticism than to the issue before the Court: that a distinction between "treaty" and "other international agreements" was intended by Congress. *See* Pet. Brief at 33 n.23.

1971 governing local national hiring. The March 6, 1961 memorandum from the Secretary of Defense referred to in the Congressional debates on the Hughes-Schweiker Amendment,[69] stated:

> The Military Departments will . . . [c]onsistent with *status-of-forces agreements, country to country agreements, and treaties*, make the maximum feasible reduction in the number of local national employees of non-appropriated fund activities. . . .[70]

Department of Defense Instruction No. 1400.23, September 18, 1974, as amended, encouraged hiring of dependents "unless precluded by *treaties or other agreements* which provide for preferential treatment for local nationals."[71]

It was only after enactment of the Hughes-Schweiker Amendment, and then only for limited purposes, that the distinction between "article II treaties" and "non-article II treaties" began to be used by the Executive Branch. The Government's coining of a new extra-constitutional entity in order to bolster its position in this case should be disregarded. As this Court has stated:

> the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.[72]

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[69] A. 202, 117 CONG. REC. 16133 (1971).

[70] Memorandum from Deputy Secretary of Defense Roswell Gilpatrick to: the Secretaries of the Army, Navy, and Air Force; the Chairman of Joint Chiefs of Staff; and the Asst. Secretaries of Defense (March 6, 1961) (emphasis added). This Court should take judicial notice of DOD circulars and policy statements. *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398, 406 n.2 (1947).

[71] "Employment of Dependents of Military and Civilian Personnel Stationed in Foreign Areas," Department of Defense Instruction 1400.23, Sept. 18, 1974, as amended April 16, 1976.

[72] *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976) (citing *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)).

B. *Congress Has Consistently Distinguished Between "Treaties" and "Other International Agreements"*

The terms "treaty" and "other international agreement" have been widely used in legislation and have come to have distinct and well-known meanings. The Court of Appeals noted that:

> This distinction between treaties and other forms of international agreements is followed in the draft Restatement of the Foreign Relations Law of the United States. [citation omitted]. *Thus under United States law, "treaties" normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status.*[73]

Congress has consistently observed this strict distinction. Thus the compilation of international agreements directed by Congress in 1 U.S.C. § 112a (1976) is mandated to be entitled "United States Treaties and Other International Agreements." The statute requiring the State Department to compile these agreements provides that the publication shall be legal evidence of "the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements. . . ." *Id.* The addition of other publications admissible as proof of "treaties, international agreements other than treaties, and proclamations by the President of such treaties and

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[73] Pet. App. 6a-7a, 642 F.2d at 556-57. (emphasis added). The draft of the RESTATEMENT cited by the court, correctly summarizes the customary use of the terms:

> § 302. Definitions: Law of the United States
>
> (a) *Treaty* means an international agreement made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring.
>
> (b) Other international agreements, some times collectively referred to as international agreements other than treaties, include executive agreements pursuant to treaty, Congressional- executive agreements (i.e., executive agreements pursuant to congressional authorization) and sole executive agreements.

RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (Tent. Draft April 1, 1980) (emphasis added). *See id.*, Introductory note 3, at 74.

international agreements," 1 U.S.C. § 113, further extends this commonplace distinction. [74]

Numerous more specific federal statutes recognize the distinctive meanings of "treaties" and "other international agreements." One clear example is 22 U.S.C. § 3304, a statute extending our country's commitments to Taiwan despite the Executive Branch's recognition of the People's Republic of China. Section 3304(c) expresses Congressional approval of "the continuation in force of all treaties and other international agreements. . . ."

The Atomic Energy Act defines "international arrangement" to include "any international agreement hereafter approved by Congress or any treaty. . . ." 42 U.S.C. § 2014(n) (1976). The Ocean Dumping Act directs international research cooperation "pursuant to international agreements and treaties made by the President with the advice and consent of the Senate. . . ." 33 U.S.C. § 1442(b) (1976). Other statutes reiterate this distinction. [75]

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[74] The Case Act, 1 U.S.C. § 112b, is included in this portion of the U.S. Code and is "for merely informational purposes. . . ." *Dole* v. *Carter*, 444 F. Supp. 1065, 1070 (D. Kan. 1977). Although the Government attempts to make much of the submission under the Case Act of five executive agreements providing local national preferences since 1971 (Pet. Brief at 40-41), it is undisputed that this procedure "is for the information of Congress rather than its approval." Rovine, *supra* note 22, at 401-02. *But see* the expressions of Congressional policy discussed in Section I, Part D, *supra*. Moreover, if these arrangements were "treaties," they would not be submitted to Congress under the Case Act.

[75] *See, e.g.*, 16 U.S.C. § 1532(8) (endangered species protected "by treaty or other international agreement"); 22 U.S.C. § 2660 (referring to copies of treaties ratified by the President); 46 U.S.C. § 391a(8)(C) (foreign certificate of shipping compliance issued under "any treaty, convention, or other international agreement"); 21 U.S.C. § 872(d) (confidentiality of records on drug abuse protected notwithstanding "treaties or other international agreements"); 21 U.S.C. § 852 (drug rehabilitation reserved as alternative to criminal penalties notwithstanding any "treaties or international agreements"); 42 U.S.C. § 242a(b) (confidentiality of mental health records protected notwithstanding any "treaties or international agreements"); 44 U.S.C. § 1511 (excluding "treaties, conventions, protocols,

The Government notes that the Executive Branch may enter into executive agreements which in most contexts could accomplish whatever a treaty can accomplish. [76] The issue here is whether in Section 106 Congress restricted this discretion in the area of local national hiring at U.S. bases to the vehicle of treaties which must, by definition, be approved by two-thirds of the Senate. The historical distinction between "treaties" and "other international agreements" recognized by the Court of Appeals is strong evidence that such was the intent of the Hughes-Schweiker Amendment.

C. *Scholars And International Law Experts Have Historically Considered "Treaty" To Denote An Agreement Approved By The Senate*

Every commentator on American foreign affairs has recognized the distinction between "treaties" and "other agreements" as self-evident.

> By common practice under [our unique constitutional system], the term "treaty" is used to refer to every agreement, whether written or verbal, important or unimportant, with one or more foreign nations which, prior to ratification by the President, receives the consent of two-thirds of the Senate. . . . [77]

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and other international agreements, or proclamations thereof by the President" from *Federal Register* and *Code of Federal Regulations*); 48 U.S.C. § 1574(a) (preserving rights "by virtue of any treaty or international agreement" in granting legislative authority to Virgin Islands); 46 U.S.C. § 481(b)(2) (applying shipping regulations to foreign vessels in U.S. ports "[u]nless otherwise prescribed by treaty or other international agreement. . . .").

[76] *See* Pet. Brief 27-28 & n.17; Court of Appeals decision, Pet. App. 6a & n.11, 642 F.2d 556 & n.11.

[77] McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 197 (1945). *Accord*, Murphy, *supra* note 32, at 222 "[T]he term 'treaty' under United States law normally connotes an agreement requiring the ratification of the Senate under article II of the Constitution. . . ." Court of Appeals decision, Pet. App. 8a, 642 F.2d at 557.

The decision in *B. Altman & Co.* v. *United States*, 224 U.S. 583 (1912), is notable principally because it construed the term "treaty" in a sense contrary

See 2 BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 370 (1902); CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 125 (1917); HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173 (1975 ed.); MATTHEWS, AMERICAN FOREIGN RELATIONS: CONDUCT AND POLICIES 545-46 (1938); MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 331 (1914); SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 121 (1919).

This Court has frequently and consistently used the term in the constitutional sense without comment or elaboration. *See Dames & Moore* v. *Regan*, 49 U.S.L.W. 4969, 4976 (1981); *Goldwater* v. *Carter*, 444 U.S. 996, 997,999 (1979) (Powell, J., concurring); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972); *New York Times Co.* v. *United States*, 403 U.S. 713, 727 n.1 (1971); *Mora* v. *McNamara*, 389 U.S. 934, 934 (1967) (Stewart, J., dissenting); *Kolovrat* v. *Oregon*, 366 U.S. 187, 193, 195 (1961); *Perez* v. *Brownell*, 356 U.S. 44, 48-49 (1958); *Reid* v. *Covert*, 354 U.S. 1, 16, 17 n.33 (1957); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920). In *Reid* v. *Covert*, this Court specifically distinguished between treaties and executive agreements. *See* 354 U.S. at 18 n.33.

The particular meaning of the term "treaty" in the United States is so deeply ingrained in the international community that one writer commented:

> The whole world, or at any rate the treaty-making portion of it, is familiar with that provision.*** Article II, Section 2, of the

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to its normal meaning, in order to fulfill the specific intent of Congress. *See* note 63 *supra*. Professor Borchard characterizes *Altman* as involving "solely the question whether the Supreme Court had jurisdiction over the interpretation of an Act of Congress, analogous to its jurisdiction over treaties." Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 644 (1945). He concluded that "[t]he Court decided to consider the agreement like a treaty, while pointing out that it was not a treaty." *Id*. *See* note 60 *supra*.

> American Constitution is an illustration of a fundamental constitutional provision, and we submit with confidence that provisions of this character must be regarded as possessing international notoriety. . . .[78]

Where a customary and historical meaning has been attached to a term, it should take a major demonstration of legislative intent to depart from such a meaning.[79] Not only is there no indication that Congress intended other than the normal meaning of "treaty" when it enacted Section 106, in this instance there is abundant evidence that it meant *just what the statute says.*[80]

III. The Constitutional Exercise Of Congressional Power Compels That Inconsistent Executive Agreements Be Superseded Without Judicial Review Of The Policies So Affected

As this Court noted in *Dames & Moore* v. *Regan*, "it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed."[81] One writer recognized the tension endemic to the constitutional allocation of power in foreign affairs:

> That the Constitution, considered only . . . affirmative grants of powers which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.[82]

Into this struggle, this Court must enter, facing claims of unfettered Executive discretion with a "poverty of really useful and unambiguous authority applicable to concrete problems of executive power

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[78] McNair, The Law of Treaties 63 (1961). Lord McNair goes on to suggest that "other States cannot hold a State bound by a treaty when in fact there has been no compliance with constitutional requirements of this type." *Id. See* Henkin, *supra* note 22, at 137.

[79] *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). *See* note 59 *supra* and accompanying text.

[80] *See* Section I *supra*.

[81] 49 U.S.L.W. at 4970.

[82] Corwin, The President: Office and Powers 200 (2d ed. 1941).

as they actually present themselves." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

This case presents a situation where the power of the Executive is "at its lowest ebb" and can be sustained "only by disabling the Congress from acting upon the subject." *Id.* at 637-38. Congress has enacted legislation which was intended to provide "that the Department of Defense cannot discriminate against American citizens or their dependents in employment on military bases."[83] Since 1971, Congress has "urge[d] the Department of Defense to continue the policy of converting foreign national positions to U.S. dependents when feasible and as vacancies occur."[84] Most recently, the Conference Committee on the fiscal year 1982 military appropriations bill "agree[d] that the DOD should take every possible action including renegotiation of existing agreements if necessary in order to enhance the employment opportunities for U.S. citizens living in overseas areas."[85]

Congress possesses Constitutional power to legislate in this area, but is dependent upon the Executive Branch to implement that legislation. Otherwise, Congress is left with little means to make the exercise of its Constitutional prerogative an effective act.[86] The Executive has thus far resisted, as it does before this Court, the execution of a legislative mandate. Upon this Court, therefore, de-

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[83] S. REP. NO. 92-93, 92d Cong., 1st Sess. 23 (1971).

[84] H.R. REP. NO. 95-1398, 95th Cong., 2d Sess. 81 (1978).

[85] H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 59 (1981), *reprinted in* 127 Cong. Rec. H9575 (daily ed. Dec. 15, 1981).

In its most recent efforts, Congress has directed the Executive Branch to provide preferential treatment of *American* citizens, while the Hughes-Schweiker Amendment only prohibited discrimination against them. *See* H.R. 4995, 97th Cong., 1st Sess. amendment No. 100 at 68-69 (Dec. 4, 1981) (which would have terminated funding for any local national hired after April 1, 1982).

[86] The Draconian use of appropriations power is one alternative. *See* note 83 *supra*. However, this does not provide a vehicle for compensating past victims — the real objective of the lawsuit — and future local national preferences could be continued under treaty provisions as deemed necessary by the President and the Senate.

volves the responsibility to ensure that the laws of the United States are effectively honored by the Executive Branch.

A. *Congress Has Acted In An Area Where It Possesses Constitutional Authority.*

The power of Congress in the arena of foreign affairs needs no detailed exposition. "Congress has needed no extravagant, uncommon constitutional interpretations. . . ."[87] Thus, this Court has affirmed the "statutory regulation of labor contracts, even if aliens may be involved, where the incidents regulated occur [in] areas under the control, though not within the territorial jurisdiction or sovereignty of [the United States]." *Vermilya-Brown Co., Inc.* v. *Connell*, 335 U.S. 377, 381 (1948), *rehearing denied*, 336 U.S. 928 (1949). Through the power to create federal offices (article II, section 2), to regulate foreign commerce (article I, section 8, clause 3), and to make appropriations (article I, section 8, clause 1), virtually "any subject of a treaty is probably also within Congressional power. . . ."[88]

There is no disagreement that the subject matter of employment practices at U.S. military facilities overseas lies within the area of shared powers under the Constitutional scheme.[89] It is, therefore, critical to evaluate the effect of the Congressional actions in enacting

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[87] HENKIN, *supra* note 22, at 67. *See* Murphy, *supra* note 32, at 235-36 (concerning Congressional authority over international agreements regarding the stationing of American armed forces abroad).

[88] HENKIN, *supra* note 22, at 159. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160 (1963). James Wilson observed at the Pennsylvania Convention on ratification of the U.S. Constitution in 1787:

> The President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." Quoted in S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 58 (2d ed. 1916).

[89] *See* Court of Appeals decision, Pet. App. 15a n.30, 642 F.2d at 560 n.30. The Government concedes also that the Base Labor Agreement in the Philippines is a "Congressional-executive agreement" in the sense that it was concluded in 1968 under a Congressional "grant of authority to the President. . . ." Pet. Brief at 27 n.16. *See* 22 U.S.C. § 1392 (1976). *Accord*, Testimony of Professor Bickel, *supra* notes 33 & 43.

the Hughes-Schweiker Amendment and subsequent Congressional pronouncements on the efficacy of local national employment preferences.

B. *Where Congress Has Exercised Its Constitutional Authority, Inconsistent Executive Agreements Are Superseded.*

This Court noted in *Dames & Moore* v. *Regan* that:

> [W]hen the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[90]

As discussed at length above, Congress has forcefully and directly challenged the preferential and discriminatory hiring of local nationals by the Executive Branch. The Court of Appeals below found "an unmistakable indication that Congress intended to abrogate those portions of the existing executive agreements providing for preferential hiring of local nationals."[91]

That the executive agreement must yield to an act of Congress is "the uniform practice."[92] The Legal Advisor to the State Department testified to Congress in 1972 that "[it is] perfectly clear that, in an area of shared presidential and congressional powers, subsequent legislation would override an executive agreement. . . ."[93] Similarly, it is clear that "Congress may prohibit certain types of executive agreements by statute. . . ."[94]

While this Court has not elaborated on the circumstances under which a statute will override an executive agreement, the opinion in

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[90] 49 U.S.L.W. at 4973 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)).

[91] Pet. App. 14a, 642 F.2d at 560. *See* Section I, Part B *supra*.

[92] Borchard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616, 623 (1945). *See* Murphy, *supra* note 32, at 244.

[93] Stevenson Statement, *supra* note 22, at 288-89. *See* Rovine, *supra* note 22, at 421.

[94] Rovine, *supra* note 22, at 423.

Reid v. *Covert*, 354 U.S. 15, 17 n.33 & 18 (1957) provides some *dictum* on the subject:

> [W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. . . . We recognize that executive agreements are involved here but it cannot be contended that such an agreement rises to greater stature than a treaty. [95]

The circumstances under which this Court has found that a treaty is superseded by a statute warrant review. In perhaps the seminal case on the subject, this Court held that the generally phrased Internal Revenue Act of 1869 superseded the 1866 treaty with the Cherokee Nation, even through the statute did not refer expressly to the treaty. *The Cherokee Tobacco*, 78 U.S (11 Wall.) 616 (1871). The Court's opinion is instructive:

> The language of the section [of the statute] is as clear and explicit as could be employed. It embraces indisputably the Indian territories. Congress not having thought proper to exclude them, it is not for this court to make the exception. There being no ambiguity, there is no room for construction. It would be out of place. The section must be held to mean what the language imports.
>
> * * * *
>
> In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. *Id.* at 620-21. [96]

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[95] *Cf. United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 206 (1955) (agreement subsequent in time to inconsistent statute must yield to statute).

[96] The dissent in *Cherokee Tobacco* sounds remarkably similar to the position urged now by the Government:

> An express law creating certain special rights and privileges is held never to be repealed by implication by any subsequent law couched in general terms, nor by any express repeal of all laws inconsistent with such general law, unless the language be such as clearly to indicate the intention of the legislature to effect such repeal. (Bradley and Davis, J.J., dissenting) 78 U.S. (11 Wall.) at 622.

The decision in *Chae Chan Ping* v. *United States*, 130 U.S. 581, 602 (1889) addressed a similar indirect abrogation by noting:

> [I]f congress has this power it is wholly immaterial to inquire whether it has, by the statute complained of, departed from the treaty or not; or, if it has, whether such departure was accidental or designed; and, if the latter, whether the reasons therefor were good or bad.[97]

Similarly, in *Sanchez* v. *United States*, 216 U.S. 167, 175-76 (1910), this Court noted that *even if* "Congress did not . . . intend by the Foraker act to modify the treaty . . . if that act were deemed inconsistent with the treaty, the act would prevail. . . ."

The Government in this case apparently confuses "repeals by implication" (Pet. Brief at 25) with the primacy of a subsequent statute over an inconsistent treaty. Professor Henkin more aptly summarized the relationship presented by this case:

> [A]cts of Congress inconsistent with earlier treaty obligations are regularly given effect by the courts. That is not to say, as is often erroneously said, that Congress can "repeal" a treaty: Congress is not acting upon the treaty, but, exercising one of its legislative powers, it legislates without regard to the international obligations of the United States.[98]

Thus, the key is not the articulation of "intent to repeal" (Pet. Brief at 25-27), but whether the statute is "clearly inconsistent" with the treaty. *United States* v. *McBratney*, 104 U.S. 621, 623 (1882).[99]

Congress has exercised its legislative powers to end the preferential treatment of local nationals at U.S. military facilities overseas. As we noted in Section I, Part A, it is impossible to effectuate this result

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[97] *See also Whitney* v. *Robertson*, 124 U.S. 190, 195 (1888); *United States* v. *McBratney*, 104 U.S. 621, 623 (1882); *Edye* v. *Robertson*, 112 U.S. 580, 597-98 (1884).

[98] HENKIN, *supra* note 22, at 164.

[99] *See National Ass'n of Property Owners* v. *United States*, 449 F. Supp. 1223, 1251 (D. Minn. 1980) (noting that Boundary Waters Canoe Area Wilderness Act of 1978 would prevail over inconsistent provision of Webster-Asburton Treaty of 1842); *Akins* v. *United States*, 551 F.2d 1222, 1229-30 (C.C.P.A. 1977).

without abrogating existing executive agreements which remain the sole means of perpetuating such discriminatory practices. The statutory provision is "clearly inconsistent" with these "diplomatic arrangements" [100] and should be given effect even if Congress had expressed no apparent intent to abrogate the agreements. [101]

C. *Foreign Policy Arguments Stemming From The Exercise Of Congressional Authority Are Not Appropriately Addressed To This Court.*

As this Court stated long ago in *Chae Chan Ping* v. *United States*, 130 U.S. 581, 602 (1889), once Congress has acted within its constitutional authority in this area "it is wholly immaterial . . . whether the reasons therefor were good or bad." The question before the Court is whether Congress sought narrowly to grant exceptions to the proscription against discrimination provided by the Hughes-Schweiker Amendment. If such a narrow exception for treaty provisions was intended, then inconsistent unilateral Executive Branch actions must be set aside [102] without consideration of the purported foreign policy consequences hypothesized by the Government.

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[100] U.S. General Accounting Office, "Department of Defense Should Change Pay Setting for Filipino Nationals," FPCD 77-70 (Oct. 5, 1977) (referring to the Base Labor Agreement). *See* A.204.

[101] Motive is similarly irrelevant. *See Chae Chan Ping* v. *United States*, 130 U.S. 581, 602-03 (1889). In *Diggs* v. *Shultz*, 470 F.2d 461, 465-66 (D.C. Cir. 1972), Judge McGowan referred to "the constitutional power of Congress to set treaty obligations at naught." He further noted the purpose of the Byrd Amendment (permitting the purchase of chrome from Rhodesia in violation of United Nations sanctions) was "in blatant disregard of our treaty undertakings" but concluded that "Congress can denounce treaties if it sees fit to do so. . . ." *See Sneaker Circus, Inc.* v. *Carter*, 457 F.Supp. 771, 795 (E.D.N.Y. 1978).

[102] "If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive. . . . The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888). *See Diggs* v. *Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972).

This potentially harsh rule is, of course, significantly mitigated by the facts in this case. No treaty is being abrogated by the Hughes-Schweiker Amendment, but rather executive agreements. If the host nation, including the Republic of the Philippines, should request the continuation of local national hiring preferences as a *quid pro quo* for the location of U.S. bases there, the Executive Branch may simply submit the arrangement to the Senate for approval. *See* Brief in Opposition to Petition at 6-8. Exactly this procedure was contemplated in 1977, but not followed. *Id.*

Since any current hiring practices could continue if approved by the Senate as treaties, the allegations that the treaty process is "*time consuming*" and "*reduces negotiating flexibility*" are the only colorable policy considerations presented in the Petitioner's Brief. Pet. Brief at 31 n.21 (emphasis added). The factual support for these contentions is, of course, absent in this record. [103] Further, it is clear that the weight to be assigned to such representations is more effectively and appropriately determined by Congress.

Finally, that Congress on December 15, 1981 called on the Executive branch to "take every possible action including renegotiation of existing agreements if necessary in order to enhance the employment

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[103] There are no findings of fact by the District Court which would support any of these allegations. The Government in the District Court argued that "it would be improper for this Court to serve as a forum for foreign policy debate." Opposition to Plaintiffs' Motion for Issuance of Letters Rogatory at 2 (Feb. 28, 1979). The Government added that "*the foreign policy prognostications of the United States Government are not subject to judicial inquiry.*" *Id.* (emphasis added). The Government thus objected to producing documents on the negotiations with the Republic of the Philippines concerning the maintenance of U.S. military bases in the Philippines and the terms and conditions of U.S. maintenance of such bases, citing the request as "irrelevant." Defendants' Objections to Plaintiffs' Document Requests at 1 (Feb. 5, 1979). The Government further objected to depositions of State Department witnesses on the grounds that the legality of the BLA "is a purely legal issue. . . ." Memorandum In Support of Motion to Quash at 1 (Feb. 12, 1979).

opportunities for U.S. citizens living in overseas areas,"[104] suggests that the weight given by Congress to these supposed foreign policy consequences has been slight.[105]

In any event, the best advice provided to date on this subject may have come from the Assistant Legal Advisor for Treaty Affairs of the State Department, writing in 1977:

> Whether the question is the desirability of a particular agreement, or whether it should be concluded as a treaty or executive agreement, or what kind of implementation is necessary or desirable, the most appropriate avenue to an efficient and yet politically responsive method of international agreement making, like all areas of foreign policy, is close communication between the two branches.[106]

Accordingly, this Court should avoid being drawn into the factual merits of a dispute between the other branches of Government. Congress has clearly addressed an issue over which it has constitutional authority and its will should not be frustrated by unsubstantiated and inappropriate policy arguments.

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[104] H.R. REP. NO. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 CONG. REC. H9575 (daily ed. Dec. 15, 1981).

[105] Congress has routinely conducted hearings on local national manpower issues. *See, e.g., Department of Defense Appropriations for 1981: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 96th Cong., 2d Sess. Part 5 (1980).

[106] Rovine, *supra* note 22, at 431. Indeed, the State Department promised to cooperate with Congress "whenever there is a serious question whether an international agreement is to be made in the form of a treaty or otherwise." *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d. Sess. 251 (1972) (letter from David M. Abshire, Asst. Sec. of State for Congressional Relations).

CONCLUSION

The hardships on our U.S. servicemen and their families stationed at facilities all over the world have not lessened in the ten years since Congress enacted the Hughes-Schweiker Amendment. The financial strain on families in this situation has probably increased. The Congressional policy of encouraging the employment of U.S. citizens and their dependents was intended "to correct [this] situation," but the Department of Defense has resisted the will of Congress and the purpose of the legislation.

There is no doubt that Congress has the Constitutional authority to exercise a role in setting the terms and conditions of employment at U.S. bases overseas. Similarly, when the full context of Congressional action on the Hughes-Schweiker Amendment is considered, there is no doubt that Congress intended the exceptions to its rule against discrimination to be narrowly defined. Any other result would nullify the statute and frustrate the intent of Congress.

This Court should affirm the Court of Appeals decision and mandate that the spirit and letter of this law finally be honored.

Respectfully submitted,

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No. 80-1924

In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents and amici go to great lengths (see Resp. Br. 26-35; AFGE Br. 7-14) to establish the many occasions on which this Court, the Executive Branch, Congress, "scholars and international law experts" have used the word "treaty" in its Article II sense. We have no quarrel with the specific instances cited by respondents and amici, or with respondents' assertion (Br. 27 n.61) that there are "[o]ther examples * * * too numerous to fully catalogue." Our contention throughout (see Pet. Br. 15-24), however, has been that the use of the word "treaty" in Section 106 cannot be deemed presumptively to refer to an international agreement that is submitted to the Senate for the concurrence of two-thirds of its members. Rather, "[a]s in all cases of

statutory construction," the term "treaty" must be interpreted "in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). The question presented by this case is thus purely one of legislative intent: whether, by the enactment of Section 106, Congress meant to place the United States in breach of its Base Labor Agreement with the Republic of the Philippines, 19 U.S.T. 5892, T.I.A.S. No. 6542 (May 27, 1968) ("BLA"), and to cast doubt on several other binding international agreements that permit this country to maintain a military presence on foreign soil (see Pet. Br. 5-6 n.3).[1]

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[1] To be sure, Congress has the power to mandate such a result. The issue is whether it intended to exercise that authority when it enacted Section 106.

Moreover, it begs the question to assert, as respondents do (Br. 36, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)), that "[t]his case presents a situation where the power of the Executive is 'at its lowest ebb.' " Only if it were already concluded that Congress, by the enactment of Section 106, in fact intended to deny the President the power to afford local national hiring preferences in international agreements other than Article II treaties would the Executive, in entering into such agreements, be "act[ing] in contravention of the will of Congress" and would " 'his power,' " therefore, be, " 'at its lowest ebb.' " *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 10, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 637.

By contrast, if it is assumed that Congress did not intend to upset at least 12 binding international agreements by its enactment of Section 106, it becomes clear that the President, by entering into the Base Labor Agreement pursuant to 22 U.S.C. 1392 (see Pet. Br. 3), "act[ed] pursuant to an express * * * authorization by Congress" (*Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 635) and that, therefore, his action is entitled to "the strongest of presumptions

1. a. Respondents' primary contention (Br. 9 & n.9) is that a construction of the word "treaty" that encompasses all binding international agreements to which the United States is a party would render Section 106 a "nullity" and "totally frustrate the purpose of Congress." Respondents err at the outset, however, by characterizing Congress' purpose as the "*eliminati*[*on*] [of] discrimination against American citizens" on Department of Defense facilities abroad (Br. 7 (emphasis added); see also *id.* at 5, 8, 36). Had Congress intended the total eradication of local national preferences, in favor of the employment solely of United States citizens and dependents, on military bases abroad, it would not have included a "treaty" exception of any sort.

Moreover, construing the "treaty" exception in Section 106 as including all binding international agreements to which the United States is a party would not permit that exception to " 'engulf the general rule' " (Resp. Br. 11, quoting Pet. App. 18a). To be sure, the Phipps incident (see Pet. Br. 35-38) was the only specific example of an individual military commander ordering discrimination against United States citizens and dependents in employment on military bases that was cited in the debates on Section 106 (117 Cong. Rec. 14394-14397, 16128, 16133 (1971) (remarks of Sen. Schweiker)), and there were indications that that situation already was being remedied (*id.* at 16133). Nevertheless, the legislative history suggests that Section 106 was intended to protect against the occurrence of similar incidents elsewhere or a recurrence of the situation at a sub-

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and widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it" (*id.* at 687).

sequent date.[2] Indeed, the memorandum that was intended to remedy the Phipps situation was only sent "to Germany and to European forces" and applied only to "nonappropriated fund activities" (117 Cong. Rec. 16133 (1971) (remarks of Sen. Schweiker)).[3]

b. Respondents also contend (Br. 5, 13) that the different treatment, for employment purposes, accorded United States citizens and foreign nationals is the result of the classification of certain jobs as "local national" positions. Because, according to respondents (Br. 3-5, 8, 13-14), such classifications are only made by way of international agreements, Congress' enactment of Section 106 must have been directed against non-Article II treaties that contain local national employment preferences, rather than against actions of individual commanders, such as that of General Phipps.[4]

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[2] Even the court of appeals recognized (Pet. App. 12a-13a) that "Congress undoubtedly may have wished to prevent situations of this kind from arising in the future."

[3] "Nonappropriated fund activities" are programs that are not funded by Congress, such as the Army and Air Force Exchange facilities.

[4] Contrary to respondents' implication (Br. 10 n.15), there is no inconsistency between, on the one hand, our reliance here (Pet. Br. 37) on Senator Schweiker's remark (117 Cong. Rec. 16132 (1971)) that "[j]ust a simple Executive order would change this" and, on the other hand, our argument in *Goldwater* v. *Carter*, 444 U.S. 996 (1979), that "the President has broad constitutional authority to terminate the Nation's treaty obligations, without seeking formal approval or acquiescence from Congress" (Br. in Opp. 8). As we explained in our opening brief (at 37), Senator Schweiker's remark indicates that he viewed Section 106 as directed against employment preferences established by individual base commanders,

The Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (NATO SOFA), however, the only international agreement even alluded to in the debates on Section 106, contains no classification of jobs as "local national" positions or otherwise. Article IX, paragraph 4 of the NATO SOFA, 4 U.S.T. 1810, merely provides that once a "sending State" (the state to which the military force belongs) determines to hire local nationals, local law must govern the terms and conditions of the local national's employment.[5]

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rather than local national hiring preferences provided for by international agreements because, while an Executive Order would have sufficed to overrule a directive by an individual commander like General Phipps, it would not have relieved the United States of its obligations under any form of international agreement. This is not inconsistent with our position in *Goldwater* v. *Carter*, because the treaty involved there, the Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178, contained a provision expressly permitting "[e]ither Party [to] terminate it one year after notice has been given to the other Party." 6 U.S.T. at 437, art. X. The result of including such a provision is that termination of the treaty not only nullifies it for domestic purposes, but also ends the international obligations created by the treaty.

[5] This provision is implemented in Germany by article 56 of the Supplementary Agreement to the North Atlantic Treaty Organization Status of Forces Agreement, Aug. 3, 1959, 14 U.S.T. 531, 593-596, T.I.A.S. No. 5351, which incorporates the applicable German labor laws in detail.

Contrary to respondents' characterization of it (Br. 4 n.3, 9 n.8), the decision of Germany's Federal Supreme Labor Court in *Federal Republic of Germany, ex rel. Armed Forces of the United States* v. *Works Council of the United States*

Moreover, as the controversial Phipps memorandum itself makes clear (see 117 Cong. Rec. 14395 (1971) (remarks of Sen. Schweiker)), prior to the action taken by General Phipps, positions that were designated "local national" were also available to United States citizens and dependents: "[T]he [European Exchange System] presently employs approximately 4,000 full and part time U.S. citizens in positions such as salesclerk, buffet attendant and secretary, which would normally be filled by local national employees." Accordingly, contrary to respondents' assertions (Br. 9 n.11, 14 n.27), it was indeed General Phipps' directive calling for the replacement of United States citizens by local nationals in EES jobs that rendered those positions unavailable to Americans. See 117 Cong. Rec. 14395 (1971) (remarks of Sen. Schweiker). In sum, respondents' reliance on the references in the debates to "local national" classifications advances their position no further than does Senator Hughes' isolated reference (117 Cong. Rec. 16126) (1971)) to "agreement[s] with the countries in which they are located" (see Pet. Br. 39-40).

2. Contrary to respondents' and amici's bare assertions (Resp. Br. 16-20; AFGE Br. 17), there is no suggestion in the legislative history of Section 106 that Congress enacted that statute "as one response

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Military Community, File No. 6 (A.B.R. 74/78) (BArbGE July 23, 1981) (translated copy lodged with the Clerk of this Court), did not deal with the rights of Germans employed at United States facilities, but rather involved the inapplicability of German law to an American dependent employed in a "local national" position at United States facilities located in the Federal Republic of Germany.

to its concern that the President's use of international executive agreements enabled him to act in the area of foreign affairs without the knowledge of the legislative branch of government." As we explained in our opening brief (at 34-35), Section 106 arose not in the context of a struggle between the executive and legislative branches for control of the conduct of the Nation's foreign affairs, but rather in the context of legislation calling for increases in military pay to offset the economic hardship suffered by many American service members overseas and to attract volunteers to the proposed All-Volunteer Forces. Nowhere in the debates or reports on Section 106 is there any hint of concern with the President's alleged use of executive agreements to exclude Congress from the conduct of foreign affairs. Accordingly, and for the reasons noted in our opening brief (at 41 n.25), respondents' and amici's reliance (Resp. Br. 17-18; AFGE Br. 17-18, 20) on Congress' use of the word "treaty" in the Case Act, 1 U.S.C. (& Supp. III) 112b, does not avail them here.

Nor does S. Res. 214, 92d Cong., 2d Sess., 118 Cong. Rec. 6870 (1972), also relied on by respondents (Br. 18-20) and amici (AFGE Br. 19-20), shed light on the meaning of the word "treaty" in Section 106. Senate Resolution 214 would have "place[d] on record the view of the U.S. Senate that '[a]ny agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent.'" S. Rep. No. 92-632, 92d Cong., 2d Sess. 1 (1972). That view, however, rested primarily on the Senate's perception that the agreements at issue dealt with matters of major policy importance, including the possibility of commitments of

United States forces and foreign assistance funds (118 Cong. Rec. 6867 (1972) (remarks of Sen. Case)). Under the Department of State's own Circular 175 Procedures (see Pet. Br. 33 n.23), international agreements that obligate the United States, under specified circumstances, to commit United States forces and to provide foreign assistance generally require the advice and consent of the Senate. In many cases, however, agreements involving the possible commitment of military forces that are approved by the Senate as Article II treaties are further implemented by executive agreements. Indeed, details such as labor preferences for local nationals frequently are dealt with in the form of such implementing executive agreements. See, *e.g.*, Agreement Implementing Article V of the Treaty of Friendship and Cooperation, United States-Spain, Jan. 31, 1976, 27 U.S.T. 3095, 3128, T.I.A.S. No. 8361, (art. XXXIII).

Moreover, the language employed in S. Res. 214 hardly supports respondents' construction of the word "treaty" in Section 106 as limited to Article II treaties. Rather, the wording of the resolution —that "any agreement * * * should be submitted as a treaty to the Senate for advice and consent"—provides one more example of Congress' ability to be quite explicit when it intends to refer only to Article II treaties (see Pet. Br. 21-22; see also *id.* at 22 n.14, 41 n.25). Congress employed no such precision in its drafting of Section 106.

3. Respondents rely (Br. 21-24) on post-enactment exhortations by Congress to the Executive Branch to review and attempt to renegotiate existing agreements in order to enhance employment opportunities for United States citizens abroad as evidence

that Congress disagrees with a construction of the word "treaty" in Section 106 that includes all binding international agreements to which the United States is a party. To the contrary, however, those very admonitions on which respondents rely *assume* the continued existence and vitality of non-Article II treaties containing local national employment preferences notwithstanding the enactment of Section 106.[6] Nowhere in the post-enactment legislative history relied on by respondents (Br. 21-24) did any member of Congress urge the Department of Defense to increase its employment of United States citizens on military bases abroad on the ground that its continued employment of local nationals pursuant to non-Article II treaties violated Section 106. Thus, as we explained in our opening brief (at pages 41-43), the relevant post-enactment legislative history confirms that Congress

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[6] See, *e.g.*, H.R. Rep. No. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 Cong. Rec. H9560, H9575 (daily ed. Dec. 15, 1981) (emphasis added) ("DoD should take every possible action including renegotiation of *existing* agreements if necessary in order to enhance the employment opportunities for U.S. citizens living in overseas areas"); H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 80 (1978) (emphasis added) ("[t]he United States and the host country *have* administrative agreements (referred to as Status of Forces Agreements) which define and prescribe requirements that the military departments *are obligated* to observe in satisfying their local civilian labor needs"); H.R. Rep. No. 95-68, 95th Cong., 2d Sess. 24 (1977) (same); H.R. Rep. No. 95-1398, *supra*, at 81 ("[t]he committee urges the Department of Defense to continue the policy of converting foreign national positions to U.S. dependents *when feasible and as vacancies occur*"); H.R. Rep. No. 95-68, *supra*, at 25 ("[t]he committee believes that the Department of Defense should *review all of these agreements and attempt to renegotiate* those which provide little or no flexibility to the military service to employ the type of labor which it believes to be lowest in cost, most efficient, or necessary for the welfare and morale of its personnel").

in international agreements that have not been submitted to the Senate

is aware that the inclusion of local national employment preferences has continued since the enactment of Section 106 and has taken no action to alter that situation.[7]

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[7] Congress most recently refused to alter the present situation in December 1981, when the Conference Committee on H.R. 4995, 97th Cong., 1st Sess. (1981), the Department of Defense Appropriations Bill for 1982, deleted a House provision (Section 777) that would have prohibited the hiring of foreign nationals for overseas positions when qualified United States citizens were available overseas to perform the work. See H.R. Rep. No. 97-410, *supra, reprinted in* 127 Cong. Rec. H9575 (daily ed. Dec. 15, 1981). In urging the deletion of the provision on the floor of the Senate, Senator Percy, Chairman of the Senate Foreign Relations Committee, emphasized the negative international consequences the enactment of such a provision might have (127 Cong. Rec. S14110 (daily ed. Nov. 30, 1981)):

> The enactment into law of section 777 of the House bill would place the United States in violation of its obligations under international agreements and international law. U.S. agreements with the Governments of the Philippines, Spain, Turkey, Iceland, and the United Kingdom, among others, granting the United States the right to use military facilities in these countries all require that local nationals be given some form of hiring preference for those positions not occupied by U.S. military personnel or U.S. civil servants.
>
> * * * * *
>
> Some host nations might view enactment of 777 as a material breach of our agreements, thus entitling them to open negotiations on terminating, redefining or further restricting U.S. basing and use rights. Nations could, for example, retaliate by suspending or reducing our current rights to engage in routine military operations such as aircraft transits.
>
> U.S. violation of international agreement and international law through adoption of section 777 would make it more difficult to obtain future base or facility rights from other countries. In addition, as the United States

4. Finally, contrary to respondents' expectations (Br. 6-7), affirmance by this Court of the court of appeals' decision would not necessarily result in the employment of respondents or any other United States citizen or dependent in overseas positions for which, under binding international agreements, the United States is committed to employ local nationals. The only rights that a "sending" country enjoys in a "receiving" or "host" country are those granted by the host country, usually in the form of agreements between the two countries. The agreements between the United States and the Philippines, however, contain no provision for the United States to fill its needs for civilian employment on the Philippine bases with United States citizens "except when the needed skills are * * * not * * * locally available, or when otherwise necessary for reasons of security or special management needs" (Pet. App. 51a). Accordingly, in an attempt to comply both with international law, which precludes the hiring of Americans when Philippine citizens are available, and with United States law, which, if the decision below is not reversed, would prohibit the hiring of Philippine citizens when American citizens are available, the positions may

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could be in violation of its own law by hiring host-country nationals or in violation of international law by hiring U.S. nationals we would be unable, as a practical matter, to hire anyone other than military or civil service employees of the U.S. Government. The result would be an important reduction of our ability to perform security functions.

Because none of the agreements Senator Percy cited is an Article II treaty (see Pet. Br. 5-6 nn.3-4), his remarks reflect an understanding that such agreements, including their local hiring preference provisions, remain in force today despite the passage of Section 106.

have to remain vacant, to the detriment of our military preparedness, support and morale. Cf. 127 Cong. Rec. S14110 (daily ed. Nov. 30, 1981) (remarks of Sen. Percy), quoted at pages 10-11, note 7, *supra*.[8]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1982

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[8] Contrary to respondents' repeated charges (Br. 6, 35, 41-43), we note the possible international consequences of the decision in this case not for the Court's review of the merits of the policies involved, but rather for its determination whether Congress *intended*, by Section 106, to bring about such drastic results.

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No. 80-1924

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BRIEF AMICI CURIAE FOR THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, CHRISTOPHER COLLINS, ROBERT PLANT AND ALBERT SALAZAR

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QUESTION PRESENTED

Whether the meaning of the word "treaty" used in Section 106 of Pub. L. No. 92-129 is limited to international agreements approved by the United States Senate pursuant to Article II, Section 2, Clause 2 of the Constitution, or encompasses other international agreements as well.

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BRIEF AMICI CURIAE FOR THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, CHRISTOPHER COLLINS, ROBERT PLANT AND ALBERT SALAZAR

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36.2, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO (AFGE), Christopher Collins, Robert Plant and Albert Salazar file this brief as *amici curiae* in support of Respondents in this action.

INTEREST OF THE AMICI CURIAE

The American Federation of Government Employees is a labor union affiliated with the AFL-CIO; the only AFL-CIO affiliate by whose charter is responsible solely for organizing federal and District of Columbia government workers. AFGE represents more than 700,000 employees of the federal government in the United States and overseas. Some AFGE members are employed by the United States in countries where the preferential hiring agreements at issue in this case are in force (*i.e.*, Spain, Turkey, Panama and Germany (Pet. Br. 6, n. 4-5)). As is discussed below, the rights of these particular AFGE members will be directly affected by the outcome of this case.

At issue in this case is whether the term "treaty" in Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. § 7201 note, is limited in meaning to international agreements approved by the United States Senate pursuant to Article II, Section 2, Clause 2 of the Constitution, or, alternatively, encompasses all international agreements entered into by the United States.

Essentially, Section 106 prohibits employment discrimination by the Department of Defense against United States citizens working overseas, unless such discrimination is permitted by a "treaty."

There presently exist numerous agreements between the United States and other countries which provide that the nationals of those countries will be given preference in employment at American military bases located in their countries. (Pet. Br. 4-5). None of the current preferential-employment agreements are "treaties" as that term is defined in Article II of the Constitution.[1]

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[1] Petitioners assert in their brief (Pet. Br. 6, n. 5) that the 1953 North Atlantic Treaty Organization Status of Forces Agreement, 4 U.S.T. 1792 (1953) (NATO SOFA), is an Article II treaty. This assertion is incorrect when applied to the status of the

Should this Court accept the definition of the term "treaty" that is urged by Respondents (the Article II definition), the Department of Defense would have no legal basis upon which to discriminate against United States citizens it employs overseas. Acceptance by this Court of Petitioners' definition of the term "treaty" would result, in all likelihood, in the displacement of AFGE members by foreign nationals in the countries where preferential-employment agreements are in force. By urging this Court to accept Respondents' definition of the term "treaty," AFGE is fulfilling its legal obligation to protect the interests of its members.

As is mentioned by Petitioners (Pet. Br. 7, n. 5), Christopher Collins, Robert Plant and Albert Salazar are plaintiffs in a lawsuit in which they allege that they were reduced in grade or fired as a result of preferential treatment being given to German nationals during a reduction-in-force, in violation of Section 106. *Collins v. Brown*, Civ. No. 79-2598 (D.D.C., filed Sept. 28, 1979). Defendants in *Collins* claim that their contested actions were taken pursuant to the NATO-SOFA agreements, 4 U.S.T. 1792 (1953); 14 U.S.T. 531 (1963), and that the actions were therefore within the ambit of discrimination permitted by Section 106. The parties in *Collins* disagree as to whether the NATO-SOFA agreements are

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NATO-SOFA between the United States and the Federal Republic of Germany (FRG).

The FRG, as an occupied power, was not a party to the NATO-SOFA when that agreement was approved by the Senate. Although the FRG became a party to NATO in 1955 with Senate approval, 101 CONG. REC. 4201, 4232-33 (1955), the 1953 NATO-SOFA was not extended to the FRG until 1963, at the time of enactment of the NATO-SOFA Supplementary Agreement, 14 U.S.T. 531 (1963). The 1963 NATO-SOFA was never submitted to the Senate for its approval. Therefore, contrary to Petitioners' assertions, Amici maintain that there is no Article II treaty in force between the United States and the FRG which provides for the preferential employment of German nationals.

Article II treaties in relation to the Federal Republic of Germany,[2] and whether only an Article II treaty would legitimize the discrimination alleged by plaintiffs to have occurred. The *Collins* case is currently pending on cross motions for summary judgment.

This Court's determination of the proper definition of the term "treaty," as that word is used in Section 106, will certainly bear upon the decision of the District court in *Collins*, and could be determinative of that case. Therefore, Collins, Plant and Salazar, as well as AFGE, have a direct and compelling interest in the outcome of this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its decision below, the Court of Appeals held invalid a provision in the 1968 Base Labor Agreement in force between the United States and the Republic of the Philippines. 19 U.S.T. 5892 (1968). The invalidated clause provided that Philippine nationals would be given preference in employment over Americans, in regard to jobs with the United States Armed Forces in the Philippines. The discriminatory provision was held to violate Section 106 of Pub. L. No. 92-129.

Section 106 prohibits the Department of Defense from discriminating against Americans overseas unless such discrimination is permitted by a "treaty."

The Court of Appeals held that although the Base Labor Agreement was an international agreement, it had not been approved by the United States Senate pursuant to Article II of the Constitution, and therefore was not a "treaty" within the "treaty" exception to Section 106.

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[2] See note 1, *supra*.

Petitioners assert that the agreement at issue in this case does not violate Section 106. They assert that any binding international agreement to which the United States is a party would fall within the "treaty" exception to Section 106. Respondents assert that the "treaty" exception found in Section 106 can only be satisfied by a "treaty" complying with Article II, Section 2, Clause 2 of the Constitution (*i.e.*, an international agreement which has been approved by the United States Senate). Amici support the position advanced by Respondents.

a. Amici urge this Court to hold that the term "treaty" in Section 106 refers solely to international agreements that have been approved by the Senate pursuant to Article II of the Constitution. In so doing, they are asking this Court to accept the ordinary, customary usage of the term "treaty" under the laws of the United States. Under our laws, usually only those international agreements carrying the imprimatur of Senatorial approval may be classified as "treaties." In most instances, even international agreements signed by the President (known as executive agreements) will not be considered "treaties" if they have not been approved by the Senate.

Petitioners urge this Court to reject the ordinary meaning of the term "treaty" in favor of a broader meaning which would encompass executive agreements and other international agreements. In order to prevail upon that theory, Petitioners must carry the burden of proving that the intent of Congress in enacting Section 106 would be promoted by defining the term "treaty" in Section 106 in such a way that it would encompass more than just Article II "treaties." *B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

b. The legislative history of Section 106 reveals that the 92d Congress intended Section 106 to be a means of curtailing discrimination committed against United

States citizens by the Department of Defense. In enacting Section 106, Congress was aware that existing international agreements between the United States and other nations fostered discrimination against American citizens. Congress had not been consulted before these agreements had been entered into.

By stating in Section 106 that employment discrimination against Americans would only be permitted if provided for in an Article II "treaty" (a "treaty" that could only come into force after Senate approval), Congress was insuring that Americans would not be discriminated against without its knowledge and approval.

c. In legislation enacted contemporaneously with Section 106 (the Case Act, 1 U.S.C. § 112b, and Senate Resolution 214, 92d Cong., 2d Sess. (1972)), the 92d Congress explicitly distinguished between Article II "treaties" and other international agreements, such as executive agreements. The 92d Congress' use of the term "treaty" in the Case Act and Senate Resolution 214 indicates that when using the term "treaty" in Section 106, the 92d Congress was referring to international agreements approved by the Senate pursuant to Article II of the Constitution.

d. If the term "treaty" in Section 106 is construed to mean only Article II treaties, there would exist fewer international agreements under which Americans could legally be discriminated against, than if the term "treaty" is construed more broadly. The intent of Congress in enacting Section 106 was to curb discrimination against Americans. Therefore, construing the term "treaty" in Section 106 as being limited to Article II treaties, would promote the purposes of Congress in enacting Section 106 to a greater extent than would a broader construction.

ARGUMENT

THE WORD "TREATY" USED IN SECTION 106 OF PUB. L. NO. 92-129 MEANS AN INTERNATIONAL AGREEMENT WHICH HAS BEEN APPROVED BY THE UNITED STATES SENATE PURSUANT TO ARTICLE II, SECTION 2, CLAUSE 2 OF THE CONSTITUTION

A. If Defined In Accordance With the Ordinary Meaning of the Word "Treaty" Under the Laws of the United States, the Word "Treaty" Used in Section 106 of Pub. L. No. 92-129 Means An International Agreement Which Has Been Approved By The United States Senate Pursuant to Article II, Section 2, Clause 2 of the Constitution

Essentially, this case involves the construction of Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. § 7201 note, which reads as follows:

> "Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term 'facility or installation operated by the Department of Defense' shall include, but shall not be limited to, any officer's club, noncommissioned officer's club, post exchange, or commissary store."[3]

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[3] The Court of Appeals below was of the opinion that replacing the phrase "[u]nless prohibited by" with either the words "unless permitted by" or "unless provided by" would convey more precisely the meaning of the statute. *Rossi v. Brown*, 642 F.2d 553, 558 n. 21 (D.C. Cir. 1980).

1. ***Pursuant to the Laws of the United States, the Word "Treaty" Ordinarily Means An International Agreement Which Has Been Approved By the United States Senate Pursuant to Article II, Section 2, Clause 2 of the Constitution***

Article II, Section 2, Clause 2 of the Constitution provides that the President "shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

The term "treaty" used in Article II of the Constitution has been said to include any international agreement, so long as the agreement "is of such a nature as to require the advice and consent of the Senate to ratification by the President." 5 G. Hackworth, *Digest of International Law* 1 (1943).

This narrow definition of the term "treaty" has been followed in the draft *Restatement of the Foreign Relations Law of the United States.* Section 302 of the *Restatement* provides:

> § 302. Definitions: Law of the United States (a) "Treaty" means an international agreement made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring.

Restatement of the Foreign Relations Law of the United States § 302 (Tent. Draft 1 Apr. 1980).

In 1975, the Acting Assistant Legal Advisor for Treaty Affairs of the Department of State conveyed the following meaning of the term "treaty," as used in the United States:

> ". . . in the United States the term "treaty" is normally used to indicate an international agreement that is to be or has been brought into force with respect to the United States by and with the advice and consent of the Senate in conformity with Arti-

> cle II of the Constitution. An international agreement brought into force with respect to the United States in any other manner is usually referred to as an "executive agreement," see 14 Whiteman, *Digest of International Law* 1, or simply as an "international agreement," see *Restatement of the Foreign Relations Law of the United States, Second*, Section 117 *et seq.* (1975) and Henkin, *Foreign Affairs and the Constitution* 173 (1072)."

Letter from John Boyd, Acting Assistant Legal Advisor for Treaty Affairs, to General Accounting Office Assistant General Counsel James Masterson, dated Aug. 8, 1975 (A. 220, 222).

The Department of State reiterated its 1975 definition of the term "treaty" in 1977, when the Acting Assistant Secretary of State for Congressional Relations wrote:

> "In the United States, the term "treaty" is . . . most frequently used to indicate an international agreement brought into force with respect to the United States in conformity with . . . Article II. An international agreement brought into force with respect to the United States in any other manner is usually referred to as an "executive agreement."

Letter from Kempton Jenkins, Acting Assistant Secretary of State for Congressional Relations, to Senator Henry M. Jackson, dated Feb. 7, 1977 (A. 207, 208).

2. Pursuant to the Laws of the United States, International Agreements Which Have Not Been Approved By the United States Senate Are Not Ordinarily Defined As "Treaties"

a. As is alluded to in the definitions of the term "treaty" set forth above, the United States may enter into international agreements which are not treaties in terms of Article II. Such international agreements are commonly referred to as "executive agreements." L. Henkin, *Foreign Affairs and the Constitution* 173 (1972). They have been described as follows:

> ". . . the President has, from the beginning of the Government, entered into various forms of agreements with foreign countries which, while they fall short of treaties in that they do not follow the prescribed constitutional methods for the conclusion of treaties, are nevertheless valid and binding.
>
> • • •
>
> "Agreements concluded by the President which fall short of treaties are commonly referred to as executive agreements and are no less common in our scheme of government than are the more formal instruments—treaties and conventions."

5 G. Hackworth, *Digest of International Law* 397 (1943). See also 2 C. Hyde, *International Law Chiefly as Interpreted and Applied By the United States* 1405 (1951).

The draft *Restatement of the Foreign Relations Law of the United States*, after defining treaties in accordance with Article II,[4] states:

> "Other international agreements, sometimes collectively referred to as 'international agreements other than treaties,' include 'executive agreements pursuant to treaty,' 'Congressional-executive agreements' [i.e., executive agreements pursuant to congressional authorization] and 'sole executive agreements."

Restatement of the Foreign Relations Law of the United States § 302 (Tent. Draft 1 Apr. 1980).

The distinction between treaties and other international agreements, such as executive agreements, has been recognized by this Court and lower federal courts. See, *e.g.*, *United States v. Pink*, 315 U.S. 203, 230 (1942); *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 318 (1936); *Neal-Cooper Grain Company v. Kissinger*, 385 F.Supp. 769, 773 (D.D.C. 1974); *Star-Kist Foods v. United States*, 169 F.Supp.

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[4] See page 8, *supra*.

268, 278 (Cust. Ct. 1958), *aff'd*, 275 F.2d 472 (C.C.P.A. 1959). But see *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912); *Hughes Aircraft v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976).

b. Petitioners have argued in their brief (Pet. Br. 16-17) that the term "treaty" would include international agreements that are not "treaties" under Article II of the Constitution, when that term is used "in its international relations sense." In relation to the facts of this case, the use of such a definition would be highly inappropriate.

The statute which this Court must construe is an act regulating the actions of the United States government with regard to its employment policies toward United States citizens. All parties to this dispute are United States citizens. This case does not involve the interpretation of an international agreement. Petitioners have not brought to this Court's attention any proper, compelling reason for this Court to construe the term "treaty" according to any standard other than the law of the United States.[6]

c. As was stated by the Court of Appeals:

> ". . . under United States law, 'treaties' normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status."

Rossi v. Brown, 642 F.2d 553, 557 (D.C. Cir. 1980).

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[6] The fact that the actions complained of occurred outside the United States does not change the domestic nature of this dispute. This is an action between United States citizens and their government, in which the proper interpretation of a law of the United States is being contested. In such a case the laws of the United States have extraterritorial effect, and will be determinative of the issues involved. See *United States v. Belmont*, 301 U.S. 324, 332 (1937); *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 318 (1936).

Normally, executive agreements are not considered to be "treaties." However, this Court acknowledged an exception to the usual definition of "treaties" when it decided *B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

In *Altman* this Court had to determine whether the term "treaty" in the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, 828, included within its ambit international agreements which had not been submitted to the Senate for approval. The Circuit Court of Appeals Act provided for a direct appeal to this Court in cases involving the validity or construction of any "treaty." The international agreement at issue in *Altman* was a reciprocal tariff agreement between the United States and France. In pertinent part, the Court's opinion states:

> ". . . we are to ascertain, if possible, the intention of Congress in giving direct appeal to this court in cases involving the construction of treaties . . . it was thought best to preserve the right to a review by direct appeal or writ of error from a circuit court in certain matters of importance, and, among others, those involving the construction of treaties. We think the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and . . . be subject to direct and prompt review by the highest court of the nation. While it may be true that this commercial agreement . . . was not a treaty possessing the dignity of one requiring ratification by the Senate . . . it was an international compact . . . We think such a compact is a treaty under the circuit court of appeals act . . ."

Altman, 224 U.S. at 600-601 (footnotes omitted).

Thus, "although the term 'treaty' under United States law normally connotes an agreement requiring the ratification of the Senate under Article II of the Constitution,

Altman indicates that it does not invariably carry such a meaning." *Rossi v. Brown*, 642 F.2d at 557. The meaning of the word "treaty" will depend upon "the intent of Congress in enacting the particular provision in which the term appears." *Id.*[6]

d. In the *Altman* case, this Court held that in relation to one particular act of Congress, an executive agreement could be considered a treaty. The Court's holding was intended to apply only to a very specific situation, the appeal to this Court of lower court rulings construing international agreements. In *Altman*, this Court determined that the purposes of Congress in enacting a particular statute would be achieved to a greater degree by defining the term "treaty" broadly, than they would be by defining that word according to its customary meaning.

In light of the ordinary meaning of the term "treaty," and this Court's holding in *Altman*, Amici respectfully submit that it is incumbent upon Petitioners to carry the burden of demonstrating that Congress did not intend to use the ordinary meaning of the term "treaty" in Section 106, if they are to prevail in this action. Petitioners

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[6] Petitioners have cited *Hughes Aircraft v. United States*, 534 F.2d 889 (Ct. Cl. 1976) in support of their argument that the word "treaty" may mean any binding international agreement. (Pet. Br. 20). In *Hughes*, the Court of Claims held that 28 U.S.C. § 1502, which denies that Court jurisdiction over matters arising out of "treaties," denies it jurisdiction over matters arising out of international executive agreements. *Hughes*, *supra* at 903 n. 17. The Court's holding was based upon the assumption that Congress' intent in denying the Court jurisdiction over matters arising from "treaties" (the desire to avoid undue judicial interference with the conduct of foreign relations by the executive branch of government) was "equally applicable to both forms of international compact . . ." *Hughes*, 534 F.2d at 903 n. 17. The Court of Claims was equating "treaties" and executive agreements in relation to a limited, specific situation, and only after having determined that the intent of Congress in enacting § 1502 clearly called for such action.

must show that Congress' purposes in enacting Section 106 would be hindered if this Court construes the word "treaty" narrowly. Absent such a showing, this Court must find that the word "treaty" as used in Section 106 was intended by Congress to have its ordinary meaning, *i.e.*, an international agreement brought into force in accordance with Article II of the Constitution.[7]

B. The Legislative History of Section 106 Indicates That Congress Intended the Term "Treaty" In Section 106 To Mean An International Agreement Approved By the United States Senate In Accordance With Article II of the Constitution

1. *Congress Enacted Section 106 in Order To End Employment Discrimination Committed Against United States Citizens Under the Auspices of Executive Agreements*

The Conference Committee Report on H.R. 6531 (the bill which eventually became Pub. L. No. 92-129) discussed the purpose of Section 106 in the following terms:

> "The Senate version contained a provision prohibiting job discrimination against American citizens and their dependents in hiring on United States military bases *in any foreign country.*
>
> * * *
>
> The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men whose

---

[7] This Court has upheld "the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary." *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939). When the words of a statute are plain, "there is no room for construction." *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 101 (1937).

dependents are effectively prevented from obtaining employment. The House accepts the Senate provision."

H.R. REP. No. 92-433, 92d Cong., 1st Sess. 31, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 1495, 1508 (emphasis added).

During the Senate debate on Pub. L. No. 91-129, Senator Hughes stated:

> "Those in the lowest ranks cannot have their wives obtain anything but a tourist visa. They are disqualified from helping themselves. And they are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located*, and are forced to live in poverty."

117 CONG. REC. 16126 (1971) (emphasis added).

In a similar vein, Senator Cook stated:

> "[I]t was my understanding that there was *an agreement*, through the NATO organization, that those young wives, because they were there on tourist visas, could not get a work permit under any circumstances."

117 CONG. REC. 16126 (1971) (emphasis added).

Senator Schweiker also participated in the debate. He quoted from a study prepared by two Army officers:

> "Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. These jobs are classified as local national jobs and American dependents cannot fill the jobs because of this classification."

117 CONG. REC. 16120, 16132 (1971).

Schweiker commented:

> "I bet that we are the only country in the world that has that unique method of discriminating against its enlisted personnel stationed abroad."

Id.

The legislative history of Section 106 reveals that the proponents of that law were concerned with *agreements* which fostered discrimination against American citizens around the world. Congress chose to curtail the employment discrimination practiced by the Department of Defense by sanctioning such discrimination only if it was authorized by a *treaty*. This indicates not only that Congress recognized the distinction between treaties and other international agreements when enacting Section 106, but also that Congress wanted the "treaty" required by Section 106 to be more than an agreement.

Section 106 represents an attempt by Congress to prevent United States citizens from being discriminated against by the executive branch in employment, and to create for itself a greater role in determining when such discrimination might be unavoidable. By providing that discrimination against Americans could be accomplished only through the use of an international agreement needing Senate approval, Congress was able to achieve both of these objectives.[8]

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[8] Petitioners argue that Senator Schweiker's major concern in sponsoring Section 106 was to prevent individual military officers from discriminating against Americans in contravention of Department of Defense policy. (Pet. Br. 34-40). In support of this argument, Petitioners emphasize Senator Schweiker's concern with a memorandum issued by an American commanding officer in Germany, in which the officer directed his subordinates to give preference in employment to foreign nationals over Americans. See Pet. Br. 35; *Rossi v. Brown*, 642 F.2d at 558.

Petitioners ignore the fact that Senator Schweiker was aware that the memorandum to which he objected was in the process of being rescinded during the Senate debate on Pub. L. No. 92-129. *Id.* "[T]hat the particular problem referred to by Senator Schweiker was already being resolved, at least suggests that Congress by enacting Section 106 had more in mind than just 'the caprice of individual officers.'" *Rossi v. Brown*, 642 F.2d at 559.

2. *Legislation Enacted Contemporaneously With Section 106 Confirms That the 92d Congress Did Not Consider Executive Agreements To Be Treaties*

The 92d Congress enacted Section 106 as one response to its concern that the President's use of international executive agreements enabled him to act in the area of foreign affairs without the knowledge of the legislative branch of government. The same concerns were again expressed by the 92d Congress when it enacted the Case Act of 1972, Pub. L. No. 92-403, 86 Stat. 619 (codified at 1 U.S.C. § 112b (1976)) and Senate Resolution 214, 92d Cong., 2d Sess., 118 CONG. REC. 6870 (1972). The distinctions drawn by the 92d Congress between Article II treaties and other international agreements can be clearly seen in both of these later enactments.

a. The Case Act provides that:

> "The Secretary of State shall transmit to the Congress the text of any international agreement, *other than a treaty*, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President."

1 U.S.C. § 112b (emphasis added).

In the Case Act, Congress specifically acknowledged the difference between Article II treaties and other international agreements to which the United States might be a party.

The legislative history of the Case Act reveals Congress' concern about the increasing use of executive agreements to implement American foreign policy:

> ". . . State Department witnesses have readily admitted the Congress has not always been kept adequately informed about the international executive agreements entered into by the President and officials of the executive branch on behalf of the United States.
>
> • • •
>
> Each incident in which such secret agreements become known creates tensions and irritations between the Congress and the executive branch which severely inhibit carrying out an effective foreign policy."

H.R. REP. No. 92-1301, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3068.

The 92d Congress was concerned that the President was making commitments for our country through secret international agreements. That Congress wanted to be aware of all international obligations that our nation had entered into. The Case Act required the executive branch to transmit to Congress all international agreements *other than treaties* because all "treaties" to which the United States is a party would have been submitted to the Senate for approval pursuant to Article II of the Constitution. The Congress that enacted the Case Act did not consider executive agreements to be treaties.[9]

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[9] The Department of State has acknowledged the refusal of the 92d Congress to equate treaties and executive agreements. In a letter written in 1975 by the Acting Assistant Legal Advisor for Treaty Affairs (discussed at page 8, *supra*) it is stated:

> "In the key and most recently enacted statute bearing on this subject, which is known as the Case Act . . . the Congress clearly marks the distinction between treaty and other international agreements . . .
>
> . . .
>
> On the basis of the foregoing, we conclude that, in the absence of a positive demonstration of a contrary intent indicated in

b. Senate Resolution 214 provided:

> "Whereas the Constitution states *the President of the United States must have the advice and consent of the Senate in order to make treaties*;
>
> Whereas an agreement with Portugal, which would provide for the stationing of American troops overseas and which would furnish Portugal with large amounts of foreign aid, is clearly a matter of sufficient importance to necessitate its submission to the Senate *as a treaty*;
>
> Whereas an agreement with Bahrain, which would provide for the establishment of a new American military base on foreign territory and the stationing of American troops overseas, is clearly a matter of sufficient importance to necessitate its submission to the Senate *as a treaty*: Now, therefore, be it
>
> Resolved, That any agreement with Portugal or Bahrain for military bases or foreign assistance should be *submitted as a treaty to the Senate for advice and consent.*"

S. Res. 214, 92d Cong., 2d Sess., 118 CONG. REC. 6870 (1972) (emphasis added).

Senate Resolution 214 was enacted because the Senate felt that the nature of certain international agreements between the United States and either Portugal or Bahrain, and the broad policy implications of such agreements, made those undertakings ". . . too important to be left to unilateral action by the executive branch." S. REP. No. 632, 92d Cong., 2d Sess. 1 (1972). In Resolution 214, the Senate expressed its recognition of the

---

the legislative history of Public Law 92-129 of which we are unaware, the meaning of the word "treaty" in section 106 should be defined as that word is used in Article II of the U.S. Constitution . . ."

Letter from John Boyd, Acting Assistant Legal Advisor for Treaty Affairs, to General Accounting Office Assistant General Counsel James Masterson, dated Aug. 8, 1975 (A. 220, 223).

difference between a "treaty" requiring its approval, and "unilateral action by the executive branch." The Senate that enacted Senate Resolution 214 did not consider executive agreements to be treaties.

c. The District Court refused to read Section 106 *in pari materia* with the Case Act as it did not believe that the two acts dealt with the same subject matter. *Rossi v. Brown*, 467 F.Supp 960, 967 (D.D.C. 1979). The Court of Appeals acknowledged that the subject matter of the two enactments was not the same, but nevertheless considered the use of the term "treaty" in the Case Act to be relevant in construing Section 106. *Rossi v. Brown*, 642 F.d at 561. This analysis was based upon the Court's belief that a similar concern was presented in both statutes (the exercise of greater Congressional control over foreign affairs matters). Additionally, the Court of Appeals thought the use of exactly the same phrase in both statutes to be intentional. *Id.*

Amici urge this Court to accept the Court of Appeals' analysis. Certainly, the meaning ascribed by Congress to a measure enacted in order to mitigate concern over unilateral executive branch actions in the foreign policy area is relevant to an analysis of an earlier measure enacted by the same Congress to mitigate closely related aspects of the same problem. See *United States v. American Building Maintenance*, 422 U.S. 271, 277 (1975); *Overstreet v. North Shore Corporation*, 318 U.S. 125, 131-132 (1943).

The explicit distinction made by the 92d Congress between treaties and executive agreements in both the Case Act and Senate Resolution 214, was an extension of the implicit distinction between those different types of international agreements which that Congress first set forth in Section 106. The Congress that enacted Section 106 did not consider executive agreements to be treaties.

C. The Purpose of Congress in Enacting Section 106 Would Be Promoted By Construing the Term "Treaty" in Section 106 to Mean An International Agreement Approved By the United States Senate In Accordance With Article II of the Constitution

Pursuant to this Court's holding in *B. Altman & Co. v. United States*, 224 U.S. 583 (1912), when construing the word "treaty," one looks to the Congressional purpose in enacting the law containing that word in order to determine whether the particular Congressional purpose would be advanced by either a narrow or a broad construction. As in all cases involving statutory construction, this Court must interpret the words of the statute at issue "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

Section 106 of Pub. L. No. 92-129 was intended by Congress to severely limit the extent to which United States citizens working for the Department of Defense in foreign countries would be subject to employment discrimination. A narrow construction of the term "treaty" in Section 106 (using the Article II definition) would promote the purpose of Congress in enacting Section 106 more than would an expansive definition. An expansive definition, holding the term "treaty" to mean all international agreeemnts, would promote employment discrimination against United States citizens in the dozens of nations where executive agreements providing for such disparate treatment are in force. As was stated by the Court of Appeals, if one were to construe the term "treaty" to encompass all international agreements, "the exception to the ban on discrimination virtually would engulf the general rule." *Rossi v. Brown*, 642 F.2d at 553.

A construction of the term "treaty" which would include all international agreements would avoid the repeal of various preferential employment clauses contained in international agreements to which this nation is a party.

However, such a construction would virtually emasculate Section 106, making it essentially a meaningless enactment. To reach that result, the purpose of Congress in enacting Section 106 would have to be ignored. Clearly, Section 106 is irreconcilable with executive agreements permitting Americans to be discriminated against on the basis of their citizenship.

To the extent that clauses in existing executive agreements cannot be reconciled with Section 106, a subsequently enacted statute, those clauses are repealed.[10] See *Reid v. Covert*, 354 U.S. 1, 18 (1957); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953), *affirmed on other grounds* 348 U.S. 206 (1955). In this regard, the Court of Appeals stated:

> ". . . Congress was aware of the existence of international agreements providing for preferential hiring of local nationals . . . this was exactly what Congress intended to nullify."[11]

Rossi v. Brown, 642 F.2d at 560.

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[10] Amici assert that the traditional judicial hesitancy to find a repeal by implication should not be as strong when an executive agreement is in conflict with a subsequently enacted statute, as it is when a "treaty" is in conflict with a subsequently enacted statute. (Pet. Br. 25-26). As Petitioners suggest (Pet. Br. 27, n. 16), "the presumption that Congress does not intend to abrogate pre-existing international agreements is based on the Senate's participation in the conclusion of Article II treaties . . ." As such legislative branch participation is usually not a factor in the promulgation of international executive agreements, courts should be less hesitant to find executive agreements to be implicitly repealed, than they would be to find "treaties" to be implicitly repealed.

[11] Throughout their brief, Petitioners warn of the unpredictable consequences which might result (in regard to the relations between the United States and the Republic of the Philippines) should this Court affirm the decision of the Court of Appeals. As such assertions are of no legal relevance to the issues to be decided by this Court, see, *e.g.*, *United States v. Nixon*, 418 U.S. 683, 704 (1974), Amici will not respond to them, other than to note that Petitioners are at liberty to submit the instant agreement to the United States Senate for its approval.

The word "treaty" used in Section 106 should be construed to mean an international agreement which has been approved by the United States Senate pursuant to Article II, Section 2, Clause 2 of the Constitution.

CONCLUSION

For the aforesaid reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 80-1924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, *et al.*, *Petitioners*,

v.

ANTHONY M. ROSSI, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia

MOTION FOR LEAVE TO FILE AND BRIEF AS AMICUS CURIAE OF THE HONORABLE WILLIAM V. CHAPPELL, JR., DAN DANIEL, PAUL S. TRIBLE, JR. AND G. WILLIAM WHITEHURST, MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1924

CASPAR W. WEINBERGER, *et al.*, *Petitioners*,

v.

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MOTION TO FILE BRIEF AS AMICUS CURIAE OF THE HONORABLE WILLIAM V. CHAPPELL, JR., DAN DANIEL, PAUL S. TRIBLE, JR. AND G. WILLIAM WHITEHURST, MEMBERS OF CONGRESS

Pursuant to Rule 36.3 of the Rules of this Court, the above-named Members of Congress hereby move the Court for leave to file a brief as *amicus curiae*, submitted herewith, in support of Respondents in this case.

The Members of Congress who seek leave to file as *amici curiae* have directly participated, as members of committees and subcommittees on armed services, appropriations and defense, in the oversight of military authorizations and appropriations and in the making of Rules for the Government and Regulation of the land and naval forces, as is their constitutional duty.

In the performance of that duty, *amici* have considered the practice of the Department of Defense of reserving employment positions at U.S. military facilities overseas and the discrimina-

tion against U.S. citizens and dependents of U.S. personnel which results from the practice. *Amici* believe they are in a unique position to bring to the attention of the Court their continued opposition to that practice, a practice which Congress sought substantially to eliminate through legislation in 1971.

In addition, *amici* are elected representatives of the public and as such are charged with securing the redress of public grievances against the Government. This duty can be discharged through an appearance as *amici curiae* before this Court.

Amici are aware of the positions heretofore taken by the parties to this case and submit that the position taken by the Government (Petitioners) raises questions of fact which *amici*, as Members of Congress, can most appropriately address.

First, the Government contends that the word "treaty" in Section 106 of Public Law No. 92-129 should be construed broadly so as to encompass executive agreements. The effect of such a construction is, of course, to exempt from the prohibition against discrimination otherwise effected by Section 106 the discriminatory practices existing at U.S. facilities in a large number of countries, including the Philippines. The Court of Appeals below correctly rejected such a construction, and *amici* wish to reinforce to the Court a seemingly obvious point: the Members of Congress sought by Section 106 to achieve a purpose, beneficial to the aggrieved members of the public, which purpose cannot possibly be achieved or even partially effectuated if the Government's position is adopted by the Court.

Secondly, *amici* believe they are best situated to answer the Government's contention (Petitioner's Brief at 40-45) that Congress has "acquiesced" in the Government's preferential hiring practices since the passage of Section 106 in 1971. This acquiescence is allegedly manifested through Congressional si-

lence in the face of the Executive Branch's execution of five executive agreements since 1971 which provide for preferential hiring of local nationals. On this point the Government is mistaken, and *amici* are uniquely in a position to demonstrate that error. As detailed in *amici's* brief, Congress has since 1971 affirmatively expressed its continued opposition to the Government's discrimination against U.S. citizens and dependents in filling employment positions at U.S. bases overseas. The House of Representatives expressed that opposition as recently as December, 1981, and *amici* wish the Court to be fully aware of that fact.

Amici do not believe that this matter of alleged Congressional acquiescence has been fully explored in the pleadings thus far submitted to the Court. In fact, Congress has not retreated from the anti-discrimination position articulated in Section 106. *Amici* believe that, in order to ensure that the Court is fully apprised of the continued Congressional opposition to the hiring practices in question, they should be allowed to do so by filing a brief as *amici curiae* in this case. The questions discussed above and in *amici's* brief are clearly relevant to the disposition of the case; the construction of "treaty" in Section 106 and the understanding of the legislation in the context of ongoing Congressional policy are of critical importance to the resolution of the issues in this proceeding.

WHEREFORE, *amici curiae* respectfully request that their motion be granted.

Respectfully submitted,

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January 11, 1982

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On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia

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BRIEF AS AMICUS CURIAE OF SEVERAL MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The amici have participated in the oversight of military authorization and appropriations, including civilian personnel practices at overseas bases, as Members of Congress charged by the United States Constitution with the responsibility to "provide for the common Defence" (article I, section 8, cl. 1), to "declare War" (*id.*, cl. 11), to "raise and support Armies" (*id.*, cl. 12), to "provide and maintain a Navy" (*id.*, cl. 13): to "make Rules for the Government and Regulation of the land and naval Forces" (*id.*, cl. 14), and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ." *Id.*, cl. 18. The amici have considered the continued practice of reserving certain overseas jobs at our bases for "local nationals" as an unacceptable practice, and

have, in the exercise of their constitutional powers and responsibilities, sought the implementation of the statute which Congress enacted to prohibit such practices. Pub. L. No. 92-129, §106, 85 Stat. 355, 5 U.S.C. § 7201 note (Supp. III). Section 106, enacted as part of the Military Selective Service Act Amendments of 1971, provides:

> Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term "facility or installation operated by the Department of Defense" shall include, but shall not be limited to, any officer's club, non-commissioned officers' club, post exchange, or commissary store.

Amici are in full support of the decision of the Court of Appeals and would like to take this opportunity to urge this Court to affirm that decision.

SUMMARY OF ARGUMENT

The problems of U.S. servicemen called upon to serve extended periods of time in distant areas of the world need no great elbaboration here. The hardship on the families of these people, particularly in the enlisted ranks, has been acute. Senator Schweiker noted in the debates that preceeded the enactment of Public Law No. 92-129:

> Not only do we treat our GI's as the very bottom of the ladder, but also we treat their dependents the same way. How can we expect people to volunteer when we treat them this way?[1]

These concerns led to the enactment by Congress of a law which provided that "the Department of Defense cannot discri-

---

[1] 117 CONG. REC. 14394 (1971).

minate against American citizens or their dependents in employment on military bases." S. REP. NO. 92-93, 92d Cong., 1st Sess. 23 (1971).

By an elaborate interpretation of the narrow exceptions Congress included in this prohibition, the Executive Branch has substantially nullified the purpose of the law. Amici urge this Court to end this perpetuation of the very conditions we in Congress sought to alleviate in 1971.

By our oversight and appropriations powers, since 1971 we in Congress have consistently reiterated our view that preferential employment of local nationals by the United States Government should be terminated as expeditiously as possible. *See, e.g.*, H.R. REP. No. 97-410, 97th Cong., 1st Sess. 54 (1981). These pleas have not been heeded by the Department of Defense. The failure of the Executive Branch to honor the purpose of Public Law No. 92-129 remains the major barrier to greater employment opportunities for U.S. citizens and their dependents at these facilities.

If anything, over the past ten years the hardships on U.S. servicemen and their families have grown, as has the need to reduce these hardships. Thus, the rationale supporting the remedial objectives of Public Law No. 92-129 is as strong, if not stronger, today as it was when the act was passed in 1971.

ARGUMENT

I. Congress Sought To Increase Hiring of U.S. Citizens And Dependents By Passage of Public Law No. 92-129, Section 106.

When Senator Schweiker introduced this bill in 1971, he commented that "our GI's [are] below just about every conceivable [poverty] index we have in this society."[2] He noted that

[2] *Id.* at 14394. *See id.* at 16123.

this "bottom of the ladder" tretment of GI's extended to their dependents as well. [3] Putting an end to the hardship imposed by restrictive hiring or dependents was at the heart of the amendment offered by Senator Hughes and Senator Schweiker. [4]

Amici are concerned that the unduly narrow view of the Government (Petitioners' Brief at 34-40) glosses over the essential fact that we in Congress intended this law to do something. Senator Schweiker noted that the problem was to stop discrimination against our citizens and their wives. He referred to GI complaints that "[t]hey could not get their wives jobs at the local exchange service." [5] Senator Hughes noted at the time that the end of the draft was contingent on improved pay and "adequate concern and care for the dependents. . . ." [6]

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[3] *Id.* at 14394.

[4] *See* Conference Committee Report, H.R. REP. NO. 92-433, 92nd Cong., 1st Sess. 31 (1971).

[5] 117 CONG. REC. 14397 (1971). "We have tried to discriminate against our own citizens and their wives in a manner that I could not imagine any country in the world doing." *Id.* A letter from an enlisted serviceman read into the *Congressional Record* by Senator Hughes capsulized the problem presented to Congress:

> My wife has a degree in nursing from an accredited college . . . But she can not work in an American hospital to help meet the high cost of living here in Germany. The Government would rather hire German people to run the wards, the food service, and many [other] services. . . . Why can't American people work in these places and try to help relieve the economic stress on the lower ranking enlisted men?
>
> * * * *
>
> The Government could give German laborers the door and hire Americans instead for jobs instead of giving the Germans preference.

Id. at 16125.

[6] *Id.* at 14396. Senator Schweiker also noted that the transition to the all-volunteer army depended on "higher pay rates, and *better* military incentives. . . ." *Id.* at 16121 (emphasis added).

The problem was identified as extending to "the Orient, Europe and around the world" by Senator Hughes when he noted:

> It is not isolated in any one region. The lower ranking military personnel of our Armed Forces have literally been left out. [T]housands live at the poverty level. They are not allowed to work even in the countries where they are forced to live. This is true in spite of the training they have had academically and their qualifications professionally.
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> * * * *
>
> Those in the lowest ranks cannot have their wives obtain anything but a tourist visa. They are disqualified from helping themselves. And *they are denied the opportunity to work on overseas bases, by agreement with the countries in which they are located,* and are forced to live in poverty. Others must leave their wives at home and endure the agony of separation for long months, and perhaps even years. . . .[7]

Senator Schweiker added to this last point when he criticized the fact that servicemen "do not even have the right to have their wives working there because we . . . give those jobs to German nationals."[8] He later read another article into the *Congressional Record* which further detailed the discriminatory practices:

> Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. *These jobs are classified as local national jobs and American dependents cannot fill the jobs because of this classification.*[9]

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[7] *Id.* at 16126. (emphasis added). The Government's attempt to explain away this passage's reference to denial of jobs at the overseas base pursuant to "agreements" (Petitioners' Brief at 40) simply makes no sense.

[8] *Id.* at 16128.

[9] *Id.* at 16132 (emphasis added). The classification of jobs as "local national" was done under a German interpretation of the NATO Status of Forces Agreement, not by General Phipps' memorandum cited by the Petitioner as the sole evil addressed by the legislation.

By enacting the amendment offered by Senator Schweiker and Senator Hughes, Congress felt it was providing that GI's and their dependents "will not be discriminated against" in this fashion. [10] The objective of the discrimination prohibition was to provide more jobs to dependents to ease the financial and psychological stress of U.S. military families overseas. [11]

II. This Court Should Construe Public Law No. 92-129, Section 106, To Achieve The Remedial Purpose Intended By Congress

This Court has consistently recognized that "remedial legislation . . . is to be construed generously to further its primary purpose." *Gomez* v. *Toledo*, 446 U.S. 639, 639 (1980). [12] The purpose of the 1971 legislation was indisputably to facilitate the employment of U.S. citizens and their dependents at U.S. bases overseas. "The will of Congress would be thwarted" if the Petitioners' narrow view of Secton 106 were adopted. [13] *See* Court of Appeals' decision, 642 F.2d at 560 & 561.

The simple fact never addressed by the Government's brief is that its interpretation of the amendment sponsored by Senator Schweiker and Senator Hughes would totally frustrate the pronouncements of Congress on the purpose of the provision. Apparently, not a single wife of an enlisted serviceman would get a nursing job at a hospital at Subic Bay Naval Station or a

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[10] *Id.* at 16133.

[11] The single case of a local commander encouraging recruitment of local nationals had already been cured. *Id.*

[12] *See, e.g., Peton* v. *Rowe*, 391 U.S. 62, 65 (1968) ("remedial statutes should be liberally construed"); *Tcherepnin* v. *Knight*, 389 U.S. 333, 336 (1967) ("remedial legislation should be construed broadly to effectuate its purposes"); *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 531, 533 (1967) ("language] which is remedial [is] . . . to be liberally construed"), *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 388, 389 (1959) ("remedial legislation of a regulatory nature" should not be strictly construed).

[13] *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26 (1957).

post exchange clerk position at Rhine-Main Air Force Base under the interpretation suggested by the Executive Branch. The sole accomplishment of the statute under this view would be to prohibit "*future* actions by individual Department of Defense commanders." Petitioners' Brief at 40.

This self-defeating construction of the provision should be avoided by this Court if the intent of Congress in 1971 and our concern in Congress since 1971 is to be honored by the Judicial Branch.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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